

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period
January 1, 1947
Through March 31, 1947
Volume 46

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1947, through March 31, 1947. 1946.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**
For the Period January 1, 1947
Through March 31, 1947

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... **OPINIONS** ...

January 10, 1947.

Miss Grace Ward,
Clerk of Circuit Court,
Bibb County,
Centreville, Alabama.

1. Sections 827(1) to 827(7), inclusive, of Title 7, Code of Alabama 1940, Pocket Supplement, also applies to appeals in criminal cases from the Circuit Court to the appellate courts of Alabama.

2. Under Section 827(2) of Title 7, Code of Alabama 1940, Pocket Supplement, which provides for the court reporter to make an original and two copies of transcripts in appealed cases—the original goes to the appellate court, one carbon copy is retained by the clerk of trial court for permanent files and one carbon copy is for appellee or his attorney (the Attorney General in criminal cases).

3. Fee of ten dollars provided for clerk of trial court by Title 7, Section 827(2), Code of Alabama 1940, Pocket Supplement, may be paid from county fine and forfeiture fund where a conviction results, and taxed as a part of the costs in the same manner as any other fee payable from said county fine and forfeiture fund.

4. Court reporter under Title 7, Section 827(3), Code of Alabama 1940, Pocket Supplement, is entitled to a transcript fee of ten cents per one hundred words for original and five cents per one hundred words for carbon copies which transcript is requested by party taking appeal, but fee for services is not taxed as costs in the case. The court reporter is not required to perform such services unless payment is made in advance or security for payment is assured him.

Opinion by Assistant Attorney General Gallion.

Dear Madam:

Your request for an official opinion, bearing date of November 18, 1946, is as follows:

"There is some confusion relating to the fees of the Court Reporter in transcribing and preparing a Transcript of the Evidence in filing the same with the Circuit Clerk in the case of an Appeal to

the Court of Appeals or the Supreme Court in criminal cases. There is also confusion as to the fees that the Circuit Clerk is entitled to for the preparation of or the inclusion of the Transcript to the Evidence in the Transcript of the Record filed by the Clerk in the Appellate Court. It is also not clear as to who pays the Court Reporter for the Transcript of the Evidence nor is it clear as to who pays or from what fund the Clerk of the Circuit Court for her services in checking and including said transcript in the record. I therefore request your opinion as to the following questions, to-wit:

"1. Does Sections 827(1) to 827(7) inclusive of Title 7, 1940 Code of Alabama apply to appeals in criminal cases from the Circuit Court to the Appellate Courts of Alabama?

"2. Section 827(1) of Title 7 places on the Court Reporter the duty to transcribe the evidence under certain conditions when there is an Appeal and Section 827(2) of Title 7 provides that the Court Reporter shall file with the Clerk an original and two copies of such transcript and that the original is to be inserted in the Transcript of the Record by the Clerk. What does the Clerk do with each of the two carbon copies of the transcript filed with the Clerk by the Reporter?

"3. The last above mentioned section provides that the Clerk is entitled to a fee of \$10.00 for his services in checking and including the Transcript of the Evidence in the Record. Does the State or County pay this fee or by whom is this fee paid and from what fund and how does the Clerk proceed to collect the same?

"4. Is the Court Reporter entitled to a fee for making the above mentioned original and two carbon copies of the Transcript of the Evidence, which is filed with the Clerk, and if so, is the same taxed and collected by the Clerk as any part of the cost in the case?

"5. Does the Clerk on an appeal in a criminal case mail the original record to the Clerk of the Appellate Court and is the Clerk also required to mail a copy of the Record, which would include one of the carbon copies of the Transcript of the Evidence filed by the Court Reporter with the Clerk, to the Attorney General of Alabama? Does the other copy of the Record remain on file with the Clerk of the Circuit Court?

"This inquiry does not relate to appeals in death cases under the automatic appeal law. The questions are asked and opinion requested as to appeals except automatic appeals in death cases."

Answers to your questions are categorically submitted herewith:

1. Answered in the affirmative. Provisions on appeal in criminal cases follow those taken in civil causes in accordance with Title 15, Section

371, Code of Alabama 1940. Sections 827(1) to 827(7) of Title 7, Code of Alabama 1940, Pocket Supplement, being a pertinent part of the provisions on appeal in civil causes, they are, therefore, equally applicable in criminal cases.

2. In Title 7, Section 768, Code of Alabama 1940, the following is provided in pertinent part:

"After taking an appeal in the manner herein provided, and filing in the cause a bill of exceptions, or the expiration of the time of filing such bill of exceptions, or if the appellant sooner direct, the clerk, the register, or judge of probate, as the case may be, shall make out a transcript as required by law, and deliver the same to the appellant. He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney, * * *."

The appellee in criminal cases is the Attorney General and you are, therefore, advised that one copy is prepared for such office.

In Title 7, Section 771, Code of Alabama 1940, it is provided as follows:

"The clerks of all courts from which an appeal lies to the supreme court or court of appeals, shall be required to make and keep on file in their office an exact copy of the record in all cases certified to said supreme court or court of appeals for use by the parties to such cases."

Therefore, a second copy is kept by the clerk of the court and retained for his permanent files.

3. Under Title 45, Section 69, Code of Alabama 1940, as amended, when a defendant is convicted and sentenced to the penitentiary, the State pays certain designated items of cost as provided in said section, subject, however, to the limitation of two hundred and fifty dollars in any one case as provided for in Title 45, Section 70, Code of Alabama 1940. No fee that is not expressly provided for in Section 69 may be paid by the State out of the convict fund. Biennial Reports of Attorney General, 1932-1934, page 165; Biennial Reports of Attorney General, 1920-1922, page 384. Inasmuch as the fee allowed the clerk for including the transcript of the evidence in the record is not a fee enumerated in Section 69, as amended, such fee may not be paid by the State from the convict fund.

Your attention is called to the provisions of Title 11, Section 83, Code of Alabama 1940, subsections (d) and (e), which provide as follows:

"(d) in all cases in which the defendant is convicted for a felony, fees for services rendered must be taxed and judgment rendered against the defendant therefor and paid by the state to the extent as provided by law, and all other fees of sheriffs, clerks of court and state's witnesses not paid by the state shall be claims against

the fine and forfeiture fund in the event an execution against the defendant is returned 'no property found' and such claims are evidenced as required by law; (e) if the defendant is convicted of a misdemeanor and sentenced to hard labor for fine and costs, or either, the fees for services under this article shall be paid by the state to the extent as now provided by law, and no execution shall issue against the defendant, and the sentence for fine and costs, or either, shall have the effect of a return of the execution 'no property found,' and all such unpaid fees of the sheriff, clerks of court and state's witnesses shall be claims against the fine and forfeiture fund when evidenced as required by law; * * *."

It will be seen from Section 83(d) that when a defendant is convicted in a felony case the fees of the clerk not paid by the State are a claim against the fine and forfeiture fund of the county in the event execution is issued against defendant and returned "no property found." It, therefore, follows that in a conviction in a felony case the ten dollar fee allowed the clerk for including the transcript of the evidence in the record, not being payable by the State from the convict fund, same may be paid from the county fine and forfeiture fund.

Likewise, it will be seen from Section 83(e) that in cases of conviction for a misdemeanor, the fee under consideration would also be paid from the fine and forfeiture fund of the county.

This fee should be taxed as a part of the costs in the case on conviction in the same manner as any other fee payable from the fine and forfeiture fund of the county. (Compare opinion Quarterly Report of Attorney General, Volume 35, page 55, for analogy.)

4. Title 7, Section 827(3), Code of Alabama 1940, Pocket Supplement, provides for a transcript fee of ten cents for each one hundred words and five cents for each one hundred words of carbon copy.

The above is not taxed as costs in the case, but as noted in the statute the "court reporter shall not be required to perform any part of such service until the payment, or security thereof, is assured."

Therefore, the court reporter should look to the appellant for fee for his services in transcribing the testimony taken on trial of the case. The appellant must pay in advance or arrange payment to the satisfaction of said court reporter.

5. Answered above in answer to question 2 submitted.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 13, 1947.

Hon. Paul Schatz,
The Medical College of Alabama,
Jefferson County,
Birmingham 5, Alabama.

1. Title 52, Section 509(6), Code of Alabama 1940, Pocket Supplement, providing for a scholarship of \$400.00 for the benefit of one qualifying resident of each county in the State in connection with attendance at the Medical College of Alabama, said scholarship is not limited by the wording of the statute to payment of tuition fees exclusively.

2. The scholarship fund provided by Title 52, Section 509(6), Code of Alabama 1940, Pocket Supplement, is to be applied only against those expenses necessary to a student's maintenance and support which arise after award is completed.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1946, is as follows:

"This is to request your formal interpretation, along the lines of our conversation yesterday, of certain provisions pertaining to county scholarships under Section 6 of the law establishing the Medical College of Alabama, (a division of the University of Alabama).

"First, is this institution permitted the interpretation that the \$400.00 scholarship is for the sole and exclusive purpose of covering tuition, which is \$400.00 per annum? If we may not, what restrictions, if any, are associated with the scholarship recipient's usage of the \$400.00 annual award?

"Second, our freshman and sophomore years are divided into semesters (two sessions) for the school year, while our junior and senior years are divided into trimesters (three sessions). We have followed the ruling that an award (irrespective of its terms) will not be honored with respect to any prior semester or trimester which has ended before our receiving notice of the award. Are we within our rights in so doing?"

You first question is answered in the negative. Title 52, Section 509(6), Code of Alabama 1940, Pocket Supplement, reads as follows:

"§ 509(6). Scholarships.—The board of trustees of the University of Alabama is hereby authorized and required to establish a scholarship for each county in the State of Alabama in the amount of four hundred dollars (\$400.00) per year for the benefit of one resident of each such county, payable from the annual appropriation to the school of medicine. To be eligible for this scholarship a person shall be a young man or woman of good character and shall have been accepted for matriculation by the authorities of the school of medicine in accordance with the current standards and requirements of said school, which standards and requirements in turn must in every way meet the requirements for an approved medical school as fixed by the council on medical education and hospitals of the American Medical Association and by the Association of American Medical Colleges. The beneficiaries of said scholarship in every instance shall be designated by a majority vote of the board of censors of the county medical society of the respective counties, subject to the approval of the board of revenue or court of county commissioners or other county governing body, however designated, of the respective counties. It is further provided that applicants for admission to the freshman class of the medical school who are bona fide residents of the State of Alabama and who meet the admission requirements of the school, including those approved by the council on medical education and hospitals of the American Medical Association and those of the Association of American Medical Colleges, shall have preferential consideration by the committee on admissions of the school." (Emphasis supplied.)

Words and Phrases, Volume 38, page 304, imparts the following legal interpretation to the word "scholarship":

"Webster defines scholarship to mean maintenance for a scholar or student, the foundation of support of a student." (Citing *Butts v. Murray*, 74 Mo. App. 526, 530, quoting Webster's Dictionary.)

The identical definition is found in 56 C. J. 137.

It is my opinion that the four hundred dollar scholarship is therefore not limited exclusively to tuition fees. If such had been conclusively intended by the Legislature, it would have been a simple matter to have stressed this limitation in the wording of the statute. Inasmuch as "scholarship" is popularly defined in our legal and standard dictionaries and textbooks as a "maintenance" allowance for a scholar or student, it would be my opinion that any legitimate use of funds incidental to attendance at a school or college, such as room and board, textbooks, equipment, necessary living expenses or such items ordinarily associated with a student's support while attending school or college, would be a proper usage of scholarship funds under the statute as well as tuition fees noted.

It is a well established maxim of law that words and phrases of a statute are interpreted as having the popular meaning accorded them. *Ex Parte Pepper*, 185 Ala. 284, 64 So. 112. Likewise, where the language of statutes is plain, no discretionary interpretations should be indulged in. *Lehman v. Robinson*, 59 Ala. 241; *L. & N. R. R. v. Western Union Tel. Co.*, 195 Ala. 124, 71 So. 118.

It is my opinion that your second inquiry is properly answered in the affirmative.

The recipient is not entitled to draw upon the scholarship fund until the time that the award creating the fund for his benefit is in fact made. It is, therefore, my opinion that his benefits accrue from the date that the actual award is entered for his benefit—and is to cover the current expenses of maintenance and support arising in accordance with items of expense within the definition of "scholarship" given you in answer to your question one, *supra*. To allow application of the fund against the expense of prior semesters or trimesters already ended would in effect allow application of said funds against items of expense which arose at a time when the student grant did not in fact exist. I find nothing contained in the statute indicating that the scholarship award should be considered retroactive in scope and it is my opinion, therefore, that the Medical College is within its rights in refusing to honor awards for application against expenses of prior semesters or trimesters that have already ended.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 13, 1947.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Officers—Houston County—Amendment XLVIII, Constitution
of 1901—Local Acts 1945, pp. 7, 9, 14, and 16.

Effective date of salary system for Houston County on Tues-
day, January 21, 1947.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 19,
1946, is as follows:

“The story in the Advertiser this morning concerning the salary
of state employees on the 20th day of Jan. prompts me to make the
following inquiry:

“By Constitutional Amendment and enabling acts of the Legis-
lature this county changes from a fee basis to salary basis at the
beginning of the next administration. Those who will go on Salary
Basis are the Probate Judge, Sheriff, Circuit Clerk, and Register in
Chancery, at which time the clerks in the various offices and the
deputies of the Sheriff will be paid by the county under a schedule
of salaries set out in the acts.

“Will the clerks of the Probate Office, the Circuit Clerk, the
Register in Chancery and the Sheriff’s deputies be paid by the County
for the day of Jan. 20th, or by the officers whose terms expire?

“Will the receipts or emoluments of the day of Jan. 20th inure
to the officials on the fee system basis, or to the county treasury
on the salary basis?”

You are advised that the regular term of the incumbent probate
judge, sheriff, circuit clerk and register in chancery ends at twelve o’clock,
midnight, Monday, January 20, 1947. It results that the various offices
referred to in your inquiry, including the compensation paid to em-
ployees, will begin on a salary basis immediately after the incumbent’s
term expires, namely, at midnight on the night of January 20-21, Mon-
day-Tuesday. This means that the first day on which all of the offices
shall operate on a salary rather than a fee basis shall be Tuesday Jan-
uary 21.

Specifically, therefore, the clerks in the probate office, the circuit clerk, the register in chancery and the sheriff's deputies, for the day of January 20, Monday, will be paid by the officers whose terms do not expire until midnight Monday. The receipts and emoluments of the day, January 20, inure to the officials on the fee system basis. The fees should not be paid into the county treasury until January 21, Tuesday.

An amendment to the Alabama Constitution of 1901 (Amendment XLVIII proclaimed ratified November 17, 1944, Proclamation Record, Vol. F. p. 369) authorizes the legislature to place the probate judge, the circuit clerk, the sheriff and the register in chancery of Houston County on a salary basis. Local Acts of 1945, pp. 7, 8, 14, and 16, all approved May 19, 1945, place the judge of probate, the sheriff, the clerk of the circuit court and the register in chancery of Houston County on a salary basis. These Local Acts further provide that the county board of revenue shall pay the salaries of the employees of such officers. Each Local Act concludes by setting the effective date of the Act as follows: "The provisions of this Act shall become effective from and after the last day of the present term of the _____ of Houston County, Alabama, and after approval by the Governor." The salary system, therefore, in the case of each officer enumerated above and in the case of his employees goes into effect "from and after the last day of the present term . . . (of the respective officers)." The only question then is (1) what is the last day of the term of the present probate judge, sheriff, circuit clerk, and register in chancery?

The terms of the probate judge, the sheriff, the circuit clerk and the register in chancery are set by the Constitution, Sections 155, 138, 165, and 163, respectively. The beginning and end of the terms are set by Title 41, Sections 16, 18, 16, and 16, respectively. All terms of the officers enumerated above, except that of the sheriff, is for a regular term of six years. The sheriff, of course, has a term of four years, and it should be added that the register in chancery holds office concurrently with the term of the chancellor, who is now the circuit judge.

Title 41, Section 16, Code of Alabama 1940, provides that the probate judge, the clerk of the circuit court, and the circuit judges shall hold their respective offices "for a term of six years from the first Monday after the second Tuesday in January next after their election and until their successors are elected and qualified." Title 41, Section 18, provides that the sheriff shall hold office "for a term of four years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

In the case of *Oberhaus v. State*, 173 Ala. 483, 55 So. 898, it was held that this phrase, "From the first Monday after the second Tuesday in January next succeeding their election," means that the terms begin "on Tuesday," and as not including the Monday from which the terms begin to run. The term of each officer enumerated in your inquiry does not begin on Monday, but the new term begins on Tuesday, January 21. The

old incumbent probate judge, sheriff, circuit clerk and register in chancery hold their respective offices all day and up until midnight Monday night. The Local Acts, therefore, become effective for the first time on Tuesday on which day all of the officers go on a salary basis and on which day the employees must, for the first time, be paid by the county and not from the fees of the various officers. For the entire day of Monday, however, January 20, the old incumbent officers are entitled to receive their fees and pay their employees out of said fees for the entire day.

The story in the Advertiser to which you refer evidently has reference to our opinion of December 14, 1946, in which we advised the Director of Personnel that the succeeding Governor would be paid his salary beginning on Monday, January 20, and that the outgoing Governor would not receive pay for that day, January 20. This opinion was based on a Code section Title 41, Section 49, Code of Alabama 1940, applying only to State officers who are on a salary, and has no relation to the officers or employees referred to in your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 16, 1947.

Hon. Bryan McAfee, Register,
Circuit Court,
Morgan County,
Decatur, Alabama.

Register—Costs and Fees—Final Record—Equity Rules 112—
Title 13, Sections 213, 997; Title 11, Section 27; Title 7, Section
5, Code of Alabama 1940.

Succeeding register not required to complete final recording
of cases determined more than six months prior to his term.

Register not making sale but distributing proceeds entitled
to fee for distributing.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your requests for official opinions, bearing dates of September 6, 1946, and September 12, 1946, are as follows:

"Re: Fees for final record, in Equity

"The former Register of the Circuit Court of Morgan County, Alabama, in equity, and the Morgan County Court of Morgan County, Alabama in Equity, passed away on or about June 8, 1946, and on June 13, 1946, I was appointed to the vacancy created by his death. Upon taking office I found that there had been no recording work done since the early part of 1942 and that some of the papers filed prior to that time have never been recorded. There are approximately 1200 cases in the Circuit Court, in Equity, and approximately 300 cases in the Morgan County Court, in Equity, which have never been recorded and which have been filed since the early part of 1942. I do not know how many cases have never been recorded prior to 1942, but I believe there is a great number.

"Please give me the benefit of your official opinion concerning the following questions:

"1. Is it the duty of a Register who takes office and finds that the final records have not been made in several cases by the former Register to make such final record, if the former Register had not collected the final record fees?

"2. Are the former Register's estate and his bondsmen, or either, liable for the costs of making the final records of cases he failed to make and for which he did not collect final record fees: If not, then from what funds will the costs for making such final records come? To what compensation will the person making such final records be entitled?

"3. When a register sells lands for division under decree of Court and the Register dies in office before dispersing the proceeds of the sale and the succeeding Register makes the distribution of the funds, who is entitled to the commission for making the sale of the land?"

In answer to your question number one you are advised that, in my opinion, the present register in chancery is not under a duty to make a final record of those equity cases which had been finally determined for more than six months prior to the time that the present register took office.

It is the duty of the register in chancery to make a final record of all proceedings in relation to any cause in the equity division. Title 7, Sec. 5, Title 13, Sec. 213, Sub-section 7, **Code of Alabama 1940**. The statute directs that this work be done by the register "within six months after the final determination of any cause." Title 13, Sec. 213, Sub-section 7, **Code of Alabama 1940**. The duty to make this final record is imposed upon the register holding office during the period of six months following the final determination of any particular case. For performing this service the register is entitled to collect a fee prescribed by law. See schedule of fees Title 11, Sec. 27, **Code of Alabama 1940**. The fee for making the final record is usually assessed as costs against one of the parties litigant and may be collected either from the party or his surety. Rule 112, Equity Rules. The fee for making a final record may be assessed and demanded before the service is performed. Title 11, Sec. 4, **Code of Alabama 1940**.

The statutes and rules referred to above direct the register in his duty to make a final record in each case before the equity court. The statutes and rules considered as a whole provide a method whereby important court proceedings are permanently recorded and whereby the officer required to make such record is paid for his services. When the final decree is rendered and includes a judgment for costs, including fees for making a final record the register has an available remedy for collecting his costs, namely, payment by one or both of the parties against whom costs are taxed or execution issued against either the party or his surety. Payment of costs by one of the parties or execution against a party or his surety for costs are the only methods provided for paying the register for his services.

In my judgment a register, who upon assuming office finds that some 1200 cases have never been recorded over a period of some four years, cannot be required to record those cases which his predecessor has neglected. Many of the parties to the litigation are no doubt out of the state, deceased, or otherwise unavailable and under these circumstances, to hold that the records must be completed without compensation is unreasonable.

It is stated as a fact in your inquiry that the former register has not collected the final record fees for any of these cases. We suggest that you as register should apply to the circuit judge to make and enter an order under the provisions of Title 13, Sec. 213, Sub-section 7, **Code of Alabama 1940**, that final records should not be made by the register in these cases unless and until one of the parties to the litigation pays the costs of such recording.

Although the present register is not required to make final record for those cases finally determined more than six months prior to his taking office, it is my opinion that you should make final records for those cases finally determined within six months immediately preceding your appointment. Our opinion on this question is enclosed. 24 Quarterly Reports of the Attorney General, p. 122.

Our answer to your question number one makes it unnecessary to answer your question number two since we have held that it is not your duty to perform the work of recording the old class of cases. If any of the old class of cases are recorded, costs should be paid by one of the parties against whom costs were taxed, or by the party requesting the final recording.

Your question number three is answered by our opinion of January 13, 1936, Biennial Report of the Attorney General, 1934-1936, p. 459, in which it was held that when the register did not make the sale but distributed the funds he is not entitled to a "Commission on sales," Title 11, Sec. 27, Code of Alabama 1940, but is entitled to the fee "For receiving, keeping, and paying out or distributing money other than that arising from sales." We also enclose a copy of this opinion.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 24, 1947.

Hon. Edgar Underwood,
Judge and Chairman,
Court of County Revenue,
Franklin County,
Russellville, Alabama.

Counties—Telephones—County Engineer.

County authorized to furnish office of county engineer, though located outside the courthouse, with a telephone for official business.

Expense of said telephone may be paid from the road and bridge fund of the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 18, 1947, is as follows:

"Franklin County has employed a County Engineer and assistants conforming to the recent act of the legislature authorizing such employment, and the employment has been approved by Mr. I. B. Rutledge, Chief Bureau of County Aid of the State Highway Department, and said county has set up an engineers office here in the county seat, near the courthouse and this engineers office is in need of a telephone.

"I am writing to ask your opinion on whether or not the county can have such telephone installed and pay for the same from the General Fund of the county or any fund."

In answer to your inquiry, it is my opinion that the county is authorized to furnish the office of the county engineer, though said office be located outside of the courthouse proper, with a telephone for official business. I am also of the opinion that the expense of said telephone may be paid from the road and bridge fund of the county.

The specific authorization for counties to furnish telephones to its officials is found in Sections 12(15) and 13 of Title 12, Code of Alabama 1940. The latest opinion of this office construing these sections holds (1) under the authority of Section 12(15) of Title 12, Code 1940, the court of county commissioners must pay for the cost of telephone service in any of the offices enumerated therein, and (2) the authority conferred on the county governing body by Section 13 of Title 12, Code 1940, is limited to county offices located in the courthouse and not governed by the terms of Section 12(15), *supra*. **Quarterly Report of Attorney General**, Volume 28, page 131.

Since the office of county engineer is not enumerated in Section 12(15) of Title 12, *supra*, said section is not applicable to the instant inquiry. Also, since the office of the county engineer in question is not located in the courthouse, Section 13 of Title 12, *supra*, has no application. Therefore, neither of said sections provide the authority for furnishing the telephone in question.

However, in my judgment, the county is authorized to furnish the office of the county engineer in question with a telephone under its general power and authority in regard to roads and bridges. **Section 43 of Title 23, Code of 1940**. Under this section, the county governing bodies have broad discretionary powers of a quasi legislative nature. In the exercise of the discretionary powers therein granted, it is my opinion that the county governing body may legally authorize a telephone for the office of the county engineer under consideration. Cf. **Quarterly Report**

of the Attorney General, Volume 37, page 99, wherein it was held the county was authorized to furnish the county engineer with an automobile for official business.

The payment for the telephone in question, in my opinion, may be made from the road and bridge fund of the county. Of course, any surplus in the general fund of the county may be transferred to the road and bridge fund. Section 47 of Title 23, Code of Alabama 1940. Cf. Quarterly Report of Attorney General, Volume 19, page 254, and authorities therein cited.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 28, 1947.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Counties—Board of Revenue—Title 22, Section 190, Code of Alabama 1940.

Board of Revenue or like governing body not authorized to expend county funds to aid in purchase of artificial leg for employee injured in course of duty, agency or employment of the county.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of January 20, 1947, is as follows:

"One of the County truck drivers had an accident on the job and lost a leg. Can the County legally help him buy an artificial leg?"

It must be taken as settled in this State that counties, being governmental agencies of the State, can be made chargeable with and liable for only such claims and obligations as the law imposes on them or authorizes or empowers them to contract for.

I know of no provision of law which expressly gives to the county governing body the right to expend county funds for the purpose mentioned in your letter; nor do I know of any provision from which it could be said that it is necessarily implied that such an expenditure may be made.

There is no question as to the power and authority of the county governing body to make an appropriation or appropriations out of the county treasury to aid in maintaining and taking care of sick and wounded persons who are unable to provide for themselves in any hospital maintained for the care of the sick and wounded.

Title 22, Section 190, Code 1940;

Quarterly Reports of Attorney General, Volume 18, page 100;

Biennial Report of Attorney General, 1934-36, page 68;

Biennial Report of Attorney General, 1936-38, page 170.

As pointed out in the above opinions, the relationship of employer and employee is not the basis for the operation of Section 190, Title 22, Code 1940. The operation of the statute turns on the clause "who are unable to provide for themselves" mentioned therein.

It is my opinion that the statute cannot be extended to aid in the purchase of an artificial leg.

It, therefore, follows that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 28, 1947.

Hon. John Graves,
State Comptroller,
Department of Finance,
Montgomery 4, Alabama.

State Comptroller, Department of Finance—Travel Expenses—
Rule and Regulation in regard thereto—Title 55, Section 86, as
amended by Acts of 1943, page 153.

The Director of Finance, with the approval of the Governor,
may make rules and regulations in regard to traveling expenses
of state employees and may also prescribe the form upon which
such traveling expenses shall be reported to the State Comptroller.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1947,
is as follows:

"We attach proposed travel regulations which may be promulgated by the Director of Finance. These regulations cover reimbursement to state employees, the amount of per diem to be paid in lieu of subsistence expenses. The basis for reimbursement is covered, in the main part, by the definition of a day embodied in these regulations.

"The simplified computation is patterned after the regulations used in connection with reimbursing federal employees.

"Some departments have been contacted and expressions received to the effect that a tremendous saving could be affected by the use of the attached travel regulations and the attached simplified form.

"Title 55, Section 86, as amended by Acts of 1943, page 153, provides, in part, as follows:

"All officers and employees who travel at the expense of the state * * * shall file with the comptroller an itemized statement of all expenses incurred, * * *

"The proposed statement of official travel (Form DFC-6, Rev.), as attached, provides for itemization of private car mileage, fares on bus, train, plane, etc.; subsistence expense; detailed miscellaneous expense, in accordance with the above statutes.

"We contemplate the issuance of an executive order to increase the maximum amount allowable to persons traveling in the service of the state, to be fixed at not more than \$5.00 per day. This is in accordance with Title 41, Section 154, as amended by Acts of 1943, page 195.

"Please furnish this department with your official opinion as to whether or not any liability will attach on the State Comptroller, the Director of Finance, or the Department of Finance, if the per diem, not exceeding \$5.00 per diem, is paid to those traveling on business for the state as outlined in the attached regulations, using statement of travel as submitted (Form DFC-6, Rev.).

"Your early opinion will be highly appreciated as there are many details to be accomplished if this procedure is placed into effect on February 1, 1947, as may be contemplated."

The only question raised by your request is whether or not the form attached hereto upon which state employees report their travel expenses to you conforms to the requirements set out by Sec. 86, Tit. 55, Code of Alabama 1940, as amended by Acts of 1943, page 153. This amendtory act provides as follows:

"§ 86. Statement of expenses filed with comptroller before warrant issues.

"All officers and employees who travel at the expense of the state or any of its departments, agencies, boards, bureaus or commissions shall file with the comptroller an itemized statement of all expenses incurred, including those for transportation, in connection with such travel at the expense of the state, agency, institution, board, bureau or commission, verified by affidavit, before any warrant shall issue for such expenses."

Under the provisions of Tit. 55, Sec. 68, the Director of Finance, with the approval of the Governor, is authorized to establish and promulgate rules and regulations with respect to the manner of performance of all functions and duties of the Department of Finance, and to the execution of the business of the Department of Finance as it relates to the business of other departments, bureaus, boards, commissions, agencies, offices and institutions of the state, and the officers and employees thereof.

It will be noted from said Section 86, Title 55, supra, that the Legislature has not spelled out in detail the form of itemized statement which shall be filed with the Comptroller by officers and employees traveling at the expense of the State of Alabama. This being true, it is my judgment that, under the authority granted to the Director of Finance by Title 55, Section 68, supra, the rules and regulations attached to your request and the form which the state employees shall file with you showing their expenses while traveling on business of the state constitute

a designation by the Director of Finance of the type of itemized statement required by said Title 55, Section 68, supra.

You are, therefore, advised it is my opinion that the adoption and promulgation of these rules and regulations and the form thereto attached by the Director of Finance with the approval of the Governor, will be proper and legal in all respects, and that neither you nor the Director of Finance will incur any liability by issuing warrants for traveling expenses based upon this form designated by you as Form D. F. C. 6 Rev.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 28, 1947.

Hon. W. W. Wilson,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Judge of Probate—Officers—Records—Costs and Fees—Title
47, Section 97; Title 13, Section 280; Title 41, Sections 132, 144,
Code of Alabama 1940.

Duty of incoming probate judge to record papers filed before
expiration of previous term, and demand fees from predecessor.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of January 16, 1947, is as follows:

“In the event there are a number of papers that have not been recorded in the probate office at the expiration of his term of office January 20-21, 1947. Thereafter would it be legal for him to record any of the papers he failed to have recorded before the expiration of his term of office?

"If the outgoing Judge of Probate has collected fees for recording of these papers and the incoming Judge of Probate has to do the recording of these papers, how shall incoming Judge of Probate collect fees for recording."

You are advised (1) that a probate judge whose term is about to expire should make every effort to finish during his term the recording of those papers filed during his term and which papers are required to be recorded; (2) that when the term of the newly elected probate judge begins the outgoing probate judge is not authorized to continue recording papers; (3) that if upon the beginning of his term the newly elected probate judge finds that certain papers have not been recorded and that the retiring probate judge has collected fees for such recording, the new probate judge should complete such recording ;and (4) that the fees collected by the retiring probate judge for recording papers actually recorded by the new probate judge should be paid to the new probate judge on demand.

The term of probate judges ended at midnight, Monday, January 20, 1947. Title 41, Section 16, Code of Alabama 1940. Therefore, up to and including January 20, 1947, it was the duty of the incumbent probate judge to record all of those papers which he had received and which were required to be recorded and for which service he had received a fee. Title 47, Section 97, Code of Alabama 1940; Title 13, Section 280, Code of Alabama 1940. Also Title 47, Sections 94, 95, Code of Alabama 1940. It is my opinion that an outgoing probate judge should make every effort to complete, during his term, the work of recording those papers filed during his term and for which he has collected a fee.

It is well known, however, that after a paper authorized by law to be recorded has been delivered to the probate judge, has been marked filed, and the fees for recording have been paid, several days or even several weeks may elapse before the actual work of recording is completed. When the term of a probate judge expires during this time, and before the actual work of recording is completed, it is my judgment that the outgoing probate judge cannot then complete the work of recording for the reason that he is no longer the probate judge. His term has ended and he is not authorized after that time to perform the duties of probate judge. His duties and powers, including his duty and power to record, cease.

The duties of the newly elected probate judge, including his duty to record certain papers, begin concurrently with his term of office. If, at the beginning of his term, the new probate judge finds that certain papers have not been recorded but that the fees for such recording have been paid to his predecessor, it is my opinion that he (the new probate judge) should complete the work of recording.

It is further my opinion that, when the newly elected probate judge performs the work of recording papers filed during the term of the preceding probate judge and the preceding probate judge has received fees for such services, the newly elected probate judge is entitled to receive from the outgoing probate judge the amount of those fees. Title 41, Section 132, Code of Alabama 1940, provides:

"§ 132. Property and papers delivered to successor.—In all cases in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property, and money belonging or appertaining to such office must, on demand, be delivered over to his qualified successor."

Further, Title 41, Section 144, provides:

"§ 144. Public officer or servant defined.—A public officer or servant, as used in this article, is intended to and shall include, in addition to the ordinary public offices, departments, commissions, bureaus and boards of the state, and the public officers and servants of counties, cities and towns, all persons whatsoever occupying positions in state institutions."

Plainly the office of probate judge is an office within the meaning of Section 132, *supra*, and it is my opinion that the fees received by the former probate judge for recording such papers is "money belonging or appertaining to such office." The amount of such fees should be delivered to the succeeding probate judge, who must do the work of recording, upon demand. See 24 Quarterly Report of Attorney General, p. 122.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 29, 1947.

Hon. O. E. Cole, Chairman,
Court of County Commissioners,
Russell County,
Phenix City, Alabama.

1. Under Title 30, Section 10, Code of Alabama 1940, the old jury commissioners may hold over and perform their duties for a reasonable period of time after a new governor has taken office, or until the new governor shall have appointed new jury commissioners and such appointees shall have qualified.

2. Under Title 30, Section 12, Code of Alabama 1940, "hold over" jury commissioners are entitled to compensation for services rendered in accordance with this statute.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1947, is as follows:

"As Chairman of the Court of or Commissioners Court of Russell County, Alabama, I request an official opinion on the following:

"The Judge of the 3rd Judicial Circuit ordered the Jury Commission of Russell County to refill the jury box of the County. The Jury Commission received compensation as per the statute for the year of 1946.

"Can the Commissioners Court of Russell County lawfully pay the claims filed by said commission for their services pursuant to an order (mandamus), by the Judge of the Circuit Court?

"Of course, as you well know their terms of office have expired, yet, they will hold until their successors are appointed by the Governor."

It is my opinion that your question should be answered in the affirmative.

Title 30, Section 10, Code of Alabama 1940, provides as follows:

"§ 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified."

Title 30, Section 12, Code of Alabama 1940, provides in part:

"Each member of the jury commission shall be paid the sum of five dollars per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered. * * *"

In an opinion to Hon. Grady Boyd, Clerk-Register, Cleburne County, under date of June 23, 1943, this office, in interpreting Title 30, Section 10, *supra*, held in part:

"As stated in the statute above (Title 30, Section 10) the jury commissioners are appointed by the governor to hold office 'during the governor's tenure of office.' Therefore, the terms of jury commissioners would ordinarily expire when the governor appointing them left office. However, the legislature has provided that the jury commissioner shall hold office for a period of time after the governor's tenure of office has expired, viz, 'and until their successors are appointed and qualified.'

"This last phrase was, of course, placed in the statute so that the old jury commissioners would be legally authorized to perform their duties after a newly elected governor has taken office and before such governor has appointed new jury commissioners and such commissioners have qualified.

"Thus the old jury commissioners may hold over and perform their duties for a reasonable period of time after a new governor has taken office. In my opinion the period of time since our former governor left office to the date of this opinion (approximately five months) cannot be said to be an unreasonable length of time for 'holding over' in this particular office, taking into consideration the normal tenure of office of the governor and the frequency of the meetings of the jury commissioners and other circumstances. See *City Council of Montgomery v. Hughes*, 65 Ala. 201; *Prowell v. The State ex rel. Hasty*, 142 Ala. 80; *Quarterly Report of the Attorney General*, Vol. 15, p. 249; *Biennial Reports of Attorney General*, 1926-1928, p. 51; *Biennial Report of Attorney General*, 1919-1920, p. 76.

"It is my opinion, therefore, that the old commission may continue to work:

"1. Until the expiration of a reasonable length of time, or

"2. Until the governor shall have appointed the new jury commissioners and such appointees shall have qualified. * * *" *Quarterly Reports, Attorney General May-June 1943*, page 89.

In *Quarterly Reports of Attorney General*, Jan.-Mar., 1940, page 37, it was also held:

"A jury commissioner is entitled to per diem if he performs any substantial service on any particular day, but the judge of probate may demand satisfactory proof before issuing warrant."

Likewise in Quarterly Report of Attorney General, April-June, 1939, page, 270, this office held:

"Members of the jury commission are entitled to the sum of five dollars per day while performing the duty of emptying and refilling jury boxes. * * *"

See also Quarterly Report of Attorney General, June-September, 1939, page 293.

Applying the above holdings of this office to the instant case, it is my opinion that upon the issuance of proper warrants from the probate judge to the effect that he is satisfied that services of the jury commissioners have in fact been performed, the Commissioners' Court of Russell County may lawfully pay the claims here under consideration that have been filed by the jury commissioners.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 29, 1947.

Hon. H. W. Clayton,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Counties—County Depositories—

1. Court of county commissioners or other governing body of the county may not designate more than one bank as its county depository. Title 12, Section 44, Code of Alabama 1940.

2. Selection of county depository by the court of county commissioners or other governing body of the county is for the period of the following calendar year only. However, if no designation is made before the first Monday in December of each year, then the old depository should continue to be the depository for a reasonable time and until its successor has been selected.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1947, is as follows:

"Title 12, Sec. 43 et seq. of the 1940 Code of Alabama provides for County Depositories in certain Counties in lieu of County Treasurers.

"The old Court of County Commissioners did not designate the County depository before going out of office January 20th. The consensus of opinion of the New Court is that both of the Banks in Guntersville should be so designated, as both have agreed to identical terms. Before taking any steps in that regard this office would appreciate an opinion by the Attorney General as to the validity of a selection by the Court at this time of the Citizens Bank of Guntersville and the First National Bank of Guntersville as Depositories of the County funds.

"At present the funds are in the First National Bank under a selection made over a year ago. What would be the status of a selection made after the first Monday in December?

"Your decision in regard to these questions at the earliest possible moment will be appreciated."

Your inquiry poses two questions: (1) May the county governing body of Marshall County designate both the Citizens Bank of Guntersville and the First National Bank of Guntersville as depositories for county funds? (2) What would be the status of a selection of a county depository made after the first Monday in December?

My answer to the first question is in the negative.

Section 44 of Title 12, Code of Alabama 1940, reads as follows:

"§ 44. How depositories selected.—The board of revenue, court of county commissioners or other like governing body shall on or before the first Monday in December of each year select as the county depository, for the placing therein of county funds for the period of the following calendar year, an incorporated state or national bank in the county, and where permitted by law shall select such bank as offers the highest rate of interest to the county on daily balances of bank deposits."

It is to be noted from this section that the word "bank" is used in the singular, and it is provided that the court of county commissioners must select as a county depository an incorporated state or national bank. From a reading of the entire article dealing with a depository in lieu of a treasurer, being Article 2 of Chapter 3, Title 12, it will be

noted that throughout this entire article the word "bank" is used in the singular. If it were possible for a court of county commissioners to designate two banks, I see no reason why it would not also be permissible to designate fifteen banks as county depositories. In my opinion, this would defeat the entire purpose and legislative intent of this article, for it is plain that the legislature only intended for one bank to be selected or designated as the county depository. See *Quarterly Report of Attorney General*, Volume 34, page 82.

I shall now consider the second question. It is my opinion that the First National Bank of Guntersville which was, over a year ago, designated as the county depository should continue to act as such for a reasonable time and until a successor has been selected. It will be noted from Section 44, Title 12, *supra*, that the designation of the county depository shall be made on or before the first Monday in December of each year, the bank so selected to act for the period of the following calendar year. In the case of *Jenkins v. State, ex rel. Watson*, 219 Ala. 554, 123 So. 31, the Supreme Court had occasion to consider a question similar to the one posed by your inquiry. It was held in that case that the county governing body could not contract with a person to act as county treasurer under the provisions of Section 52 of Title 12, Code of 1940, which said section was formerly Section 322 of the Code of 1923, for a period longer than one year. The court held in that case that a designation of a county treasurer for a period longer than one year was illegal, and that county treasurers should be designated on a year to year basis. However, the court further held that even though a contract for a county treasurer for a period longer than one year was illegal, the county treasurer so designated should hold office until a successor was selected either under the provisions of Section 44, Title 12, *supra*, or under Section 52, Title 12, *supra* (Section 316, Section 322, Code of 1923). It is my opinion that the same rule of law would be equally applicable to the designation of a depository under Section 44, Title 12, *supra*.

Since the term of the First National Bank of Guntersville as county depository expired with the last calendar year, and no action has yet been taken under Section 44, Title 12, *supra*, to designate its successor, you are advised that the court of county commissioners of your county may now designate either the First National Bank of Guntersville or the Citizens Bank of Guntersville as its county depository for this calendar year.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 30, 1947.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

TAXATION—MORTGAGE TAX

The United States and its agencies are not subject to the mortgage tax levied under Tit. 51, Sec. 619 of the Code of Alabama.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of January 21, 1947, is as follows:

"Please give me an opinion as early as possible, whether or not the Cowikee Credit Association doing business on a carter No. 5355 Federal Credit Union is subject to a mortgage tax, they being the grantee. Attached you will find a copy of a letter from the Cowikee Credit Association, which refers to Federal opinion on this matter."

The Federal Credit Union here sought to be subjected to a mortgage tax under Tit. 51, Sec. 619, of the Code of Alabama 1940, was organized under an act of the Congress of the United States, known as the Federal Credit Union act, U. S. C. A., Tit. 12, Sections 1751 - 1771. Section 1752 of this Act defines Federal Credit Union as a cooperative association and Section 1753 provides that seven or more natural persons may form the Union.

Under the law this Union is an agency of the Federal Government. This principle is so universally recognized by the courts that it is unnecessary to cite authority.

This Act of Congress, in Section 1768, says:

"The Federal Credit Unions organized hereunder, their property, their franchises, capital, reserves, surpluses and other funds and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any state, territorial or local taxing authority."

There is an exception added which authorizes the assessing and levying of taxes on the organization's real property and tangible personal property. The Supreme Court of the United States has had Sec. 619,

Tit. 51 of the Code of Alabama 1940 before it and held that the statute levies a general tax on mortgages. **Federal Land Bank vs. D. W. Crosland**, 261 U. S. 374; 29 A. L. R. page 1. This case holds that the tax is invalid and unenforceable against the United States and its governmental agencies.

Under the foregoing, I am impelled to conclude that the Cowikee Credit Association is not subject to a mortgage tax.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 3, 1947.

Hon. F. W. Hare,
Circuit Judge,
Monroe County,
Monroeville, Alabama.

Circuit Clerks—Circuit Judges—Vacancies.

Under Section 165 of the Constitution of Alabama, 1901, the authority to fill any vacancy which occurs in the office of Clerk of the Circuit Court is vested in the Judge of the Circuit Court, and the person appointed to fill the vacancy shall hold the office for the unexpired term.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1947, is as follows:

"There has been considerable confusion in the minds of many people in Baldwin County as to whose duty it is, under the law, to appoint a Circuit Clerk to fill the term of office to which Robert S. Duck was elected on November 5, 1946.

"Mr. Duck died on November 18, 1946, following his election, before he had qualified for the new term, and some sixty days prior to the expiration of his old term to which he was elected in November, 1940.

"Immediately upon Mr. Duck's death I appointed his widow to the office of Circuit Clerk for the unexpired portion of the term which he was occupying at the time of his death, expressly limiting this appointment to the first Monday after the second Tuesday in January, 1947, as provided by section 16, Title 41, Code of 1940.

"It is my contention that my only authority is contained in Section 165 of the Constitution of Alabama, and is there limited to appointment for an unexpired term. My further contention is that by this appointment I exhausted all the authority given me by law, and that I have no authority to appoint for the full term of office to which Mr. Duck was elected in November, 1946.

"I will appreciate an opinion from your office with respect to my authority under said Section 165 of the Constitution of Alabama with respect to the new term."

In my opinion, you and you alone, as Judge of the 21st Judicial Circuit which includes Baldwin County, are authorized to fill the vacancy now existing in the office of Clerk of the Circuit Court of Baldwin County, which vacancy was created by the death of Mr. Robert S. Duck on November 18, 1946.

The facts are sufficiently stated in your request for opinion.

Section 165 of the Constitution of Alabama, 1901, reads as follows:

"Clerks of the circuit court shall be elected by the qualified electors in each county for the term of six years, and may, when appointed by the chancellor, also fill the office of register in chancery. Vacancies in such office of clerk shall be filled by the judge of the circuit court for the unexpired term."

Title 41, Section 16, Code of Alabama, 1940, provides:

"Terms of judicial officers.—The chief justice of the supreme court and associate justices of said court, the judges of the court of appeals, circuit judges, judges of probate courts, and clerks of the circuit court, and judges of inferior courts, when not otherwise provided for by law, shall hold their respective offices for the term of six years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

The Supreme Court of Alabama in the case of *State ex rel. Foster v. Rice*, 230 Ala. 608, 168 So. 292, held that this code section (it was then Section 2567 of the Code of Alabama, 1923) was not violative of Section 155 of the Constitution of Alabama, 1901, which fixes the term of constitutional officers in the judicial department of the state. The only

difference between Section 155 and Section 165, *supra*, in so far as the term of office is concerned, is that Section 155 contains a so-called "hold-over" clause, whereas Section 165 does not. However, in my opinion, that is not here material. On the basis of the reasoning used by the majority of the court in *State ex rel. Foster v. Rice* in holding Title 41, Section 16, *supra*, to be not violative of Section 155, *supra*, the conclusion is inescapable that it does not violate Section 165, *supra*. The majority of the court also held in that case that this code section now fixes the date on which the six year terms of judicial officers elect shall begin and also the date on which the ensuing term shall end. By the same token, it fixes the date on which the six year terms of clerks of the circuit court elect shall begin and the date on which the ensuing term shall end. This case was reaffirmed by the Supreme Court of Alabama in the case of *State ex rel. v. Bland St. John*, 244 Ala. 269, 13 So. (2d) 161.

So it is settled law in this state that the terms of clerks of the circuit court are for six years "from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Applying that rule to the instant situation, the term to which Mr. Duck was elected in November, 1940, and which he was serving at the time of his death on November 18, 1946, ended at midnight January 20, 1947, that being the first Monday after the second Tuesday in January next after the last election at which clerks of the circuit court were elected. Likewise, the six year term to which Mr. Duck was elected in November, 1946, began at midnight January 20, 1947, immediately after the expiration of his old term.

It follows that the death of Mr. Duck on November 18, 1946, and before he had qualified for the new term, created two vacancies in the office of Clerk of the Circuit Court of Baldwin County—one in the term to which he was elected in November, 1940, and which he was then serving and which expired at midnight January 20, 1947, and the other in the term to which he was elected in November, 1946, and which began at midnight January 20, 1947. Such is the unmistakable effect of the holding of the majority of the Supreme Court of Alabama in *State ex rel. Foster v. Rice*, *supra*.

It is conceded that you had the authority, under Section 165, *supra*, to appoint Mrs. Duck to fill the vacancy in the term of office to which Mr. Duck was elected in November, 1940, and which he was serving at the time of his death, such appointment to be effective until the expiration of that term at midnight January 20, 1947.

It is my opinion that you likewise have the authority to appoint someone to fill the vacancy now existing in the term of office to which Mr. Duck was elected in November, 1946, and which began at midnight January 20, 1947, the person so appointed to hold the office for the remainder of that term or until midnight of the first Monday after the

second Tuesday in January, 1953, and until his successor is elected and qualified. That this is true there could be no doubt were it not for the use of the words "for the unexpired term" in Section 165, supra. It may be argued that the use of these words in that section limits your appointive authority in the premises to the filling of vacancies for unexpired terms, and that the vacancy in the term to which Mr. Duck was elected in November, 1946, and which began at midnight January 20, 1947, is not a vacancy for an unexpired term. This on the theory that an unexpired term presupposes a previous incumbent in the office who has served some portion of the term. In support of this view, it has been suggested that the terms "vacancy" and "unexpired term" are not synonymous. See cases cited and collated in 43 Words and Phrases 194. It is conceded that this is the general rule. However, it is not an invariable rule, and the word "vacancy" sometimes signifies an "unexpired term." *State ex inf. Hadley v. Corcoran*, 206 Mo. 1, 103 S. W. 1044, 1048, 12 Anno. cases 565. Be that as it may, I am convinced that the rule has no application here. It is my opinion that the words "for the unexpired term" were used in Section 165, supra, to signify the length of time which a person appointed to fill a vacancy in the office of clerk of the circuit court would hold the office by virtue of such appointment. The section provides that vacancies in such office of clerk shall be filled by the judge of the circuit court. I am persuaded that this means all vacancies. It does not purport to provide for the filling of unexpired terms.

It has also been suggested that the vacancy in the term of office to which Mr. Duck was elected on November 5, 1946, and which began at midnight on January 20, 1947, should be filled by the Governor under his residual appointive powers, but this argument falls of its own weight. As stated above, this vacancy certainly should be filled by you, as Judge of the Circuit Court of the 21st Judicial Circuit, were it not for the use of the words "for the unexpired term" in Section 165, supra. The Governor's residual appointive powers are found in Title 41, Sections 176 and 177, Code of Alabama, 1940, which read respectively:

"Vacancies in state and county offices; how filled; term of office— Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired a qualified person to fill the unexpired term of such office." (Emphasis supplied.)

"Vacancies in state, county and municipal office filled by governor—Whenever any office of the state, of any county, or municipality thereof, is vacant from any cause, and there is no way provided by law for the filling of such vacant office, the governor shall appoint a qualified person to fill the unexpired term of such office." Emphasis supplied.)

It may be seen from a reading of Section 176, supra, that anyone appointed by the Governor under this section to fill a vacancy in a state or county office shall hold the office for the unexpired term. A reading

of Section 177, *supra*, shows that an appointment made by the Governor to any state, county or municipal office under that section is an appointment for the unexpired term of such office. So that, if you have no authority to fill the vacancy in the office of Clerk of the Circuit Court of Baldwin County for the term to which Mr. Duck was elected in November, 1946, and which began at midnight January 20, 1947, because there was or is no "unexpired term" of such office, it follows that for the same reason the Governor has no authority to act in the premises. Certainly, someone has the authority to fill this vacancy, as "the law abhors vacancies in public offices, and great precautions are taken to avoid their occurrence. *Prowell v. State*, *ex rel. Hasty*, 142 Ala. 80, 39 So. 164. See also *State ex rel. Foster v. Rice*, *supra*, and *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429.

For the reasons set forth above, it is my opinion that you, as Judge of the Circuit Court of the 21st Judicial Circuit, have the authority to appoint some qualified person to fill the vacancy now existing in the office of the Clerk of the Circuit Court of Baldwin County for the term to which Mr. Duck was elected in November, 1946, and which began at midnight January 20, 1947, the person so appointed to hold the office for the remainder of the term as prescribed by law or until midnight of the first Monday after the second Tuesday in January, 1953, and until his successor is elected and qualified.

The fact that Mrs. Duck is still holding and exercising the duties of the office of Clerk of the Circuit Court of Baldwin County under the "hold-over" clause of Title 41, Section 16, *supra*, which she has a right to do until her successor is appointed and qualified, has no bearing on the existence of a vacancy in that office as to the term to which Mr. Duck was elected in November, 1946, and which began at midnight January 20, 1947; nor does it militate against your authority to now appoint some qualified person to fill such vacancy. Since midnight January 20, 1947, the expiration of the term to which she was appointed, she has been holding as a *de facto* and not as a *de jure* officer, and her right to so hold will terminate upon the qualification of the person appointed by you to fill the vacancy now existing in that office. *State ex rel. Foster v. Rice*, *supra*, and cases therein cited in both the minority and majority opinions.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 3, 1947.

Hon. W. H. Drinkard,
Director of Finance,
Department of Finance,
Capitol.

State Docks and Terminals—Expansion Program—Bonds—
General Acts 1945, p. 79.

Depreciation is an item that should be set up by the Department of State Docks and Terminals of Alabama as a part of the maintenance and operation expenses incurred in the operation of the State Docks and Terminals.

Opinion by Assistant Attorney General Abruthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1947, is as follows:

"The Department of State Docks and Terminals of the State of Alabama is seeking to sell on February 5, 1947, three million dollars of revenue bonds pursuant to the provisions of Act. No. 82, 1945 Legislature.

"Your official opinion is requested as to whether or not the maintenance and operating expense and cost include depreciation which may be set up by this department. I have been advised by prospective bond buyers that this item of depreciation will greatly reflect in their bid for these bonds, inasmuch as it will directly affect the net proceeds from which the bonds are payable.

"I enclose you for your information a copy of the bond order and also a schedule of their **passed** operations which will give you an idea as to the amount of depreciation in dollars and cents.

"It is hoped that you will be able to let your official opinion come forward at an early date as this information should be available to the bidder."

Section 1 of Act 82, General Acts of Alabama 1945, page 79, which Act provides for the issuance and sale of the bonds under consideration, provides in part as follows:

"* * * Any order of the Director of the Department authorizing the issuance of any such Revenue Securities may contain provisions which shall be a part of the contract between the Department and the holder or holders thereof, which provisions may pledge the revenues of the Department out of which the same shall be payable,

and the use and disposition of such revenues, * * * * Such Revenue Securities may be made payable out of the gross revenues of the unit or units or facility or facilities which are to be constructed, purchased, or otherwise acquired by the Department in whole or in part out of the proceeds thereof, and if such revenues be insufficient such securities may be payable out of the gross revenues of the Department as a whole or out of the gross revenues or any one or more of the other units or facilities of the Department; subject, however, to the provisions of law concerning the payments required to be paid into the sinking fund for the State of Alabama Harbor Improvement Bonds, as such provisions exist at the time the particular Revenue Securities are issued hereunder, and subject to the payment of the necessary expenses of operation of the Department and the maintenance and repair of its properties and facilities. * * * " (Emphasis added.)

The order of the Department of State Docks and Terminals of the State of Alabama under date of December 31, 1946, issued pursuant to the provisions of Act No. 82, supra, authorizing the issuance of bonds under consideration, contains the following pertinent provisions:

"Principal of and interest on the issue of bonds of which this bond is one are payable from and secured by pledge of the revenues of the Department, including the gross revenues to be derived from the operation of the facilities acquired with the proceeds of said issue, subject to such existing requirements for the payments of maintenance and operation expenses and application to the sinking fund requirements for certain outstanding bonds in the manner and to the extent more particularly specified in the order of the Department authorizing said issue.

"The said revenues of said Department are to the extent hereinabove stated and to the extent necessary to pay the interest upon and principal of this bond, and the other bonds of this issue, as such interest and principal mature irrevocably pledged to the payment thereof." (Section 1, pages 4 and 5.)

"From and after the issuance of any of the bonds, all of the revenues are hereby pledged for the purposes of the following funds and shall be set aside into the following special funds:

"(a) Out of the revenues there shall be first set aside from time to time as needed during each fiscal year (the fiscal year for the purpose of this order being the year commencing on October 1 of each year and ending on September 30 of the following year) the reasonably necessary expenses of operating the Department and maintaining and repairing the system. This fund shall be designated as the 'Operation and Maintenance Fund.' Revenues derived from the operation of the part of the system which is to be acquired with the proceeds of the bonds shall never be paid into said fund except

at any time or times at which there are no other funds of the Department legally available for such purpose, and then only to the extent of the deficiency in such funds." (Section 5, page 7.)

Act No. 82 authorizing the issuance of the bonds does not designate the items that constitute "maintenance and operation expenses." Neither does the order of the Department referred to above designate such items except Section 6C of the order provides that all expenses incurred in the making of the audit required by said Section 6C "shall be regarded and paid as a maintenance and operation expense."

In the case of *Lindheimer v. Illinois Telephone Company*, 292 U. S. 151, the court made the following statement in reference to depreciation:

"Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered. The amount necessary to be provided annually for this purpose is the subject of estimate and computation."

It will be seen from the *Lindheimer* case that it is proper to include annual depreciation in the "operating expenses" of a telephone company.

In the case of *City of Knoxville v. Knoxville Water Company*, 212 U. S. 1, the court, in dealing with the question of the depreciation of a water company, said:

"Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would

inevitably lead to disaster either to the stockholders or to the public, or both."

In "Accountant's Hand Book," Third Edition, edited by W. A. Patton, the following statement is found on page 711:

"DEPRECIATION DEFINED.—Himmelblau (Third International Congress on Accounting) refers to depreciation as the process 'of spreading the value of a fixed asset over the accounting periods comprising its service life.' In a special report by the Interstate Commerce Commission depreciation of railway property is defined as 'the loss in service value not restored by current maintenance and incurred in connection with the consumption or prospective retirement of property in the course of service from causes against which the carrier is not protected by insurance, which are known to be in current operation, and whose effect can be forecast with a reasonable degree of accuracy.' * * * * According to Montgomery (Auditing Theory and Practice) depreciation is 'an allocation of the entire cost of depreciable assets to the operating expenses of a series of fiscal periods.' "

It will be seen from the above authorities that depreciation is considered an item of operating expense and that it is the duty of a corporation to see that from its earnings the value of the property invested is kept unimpaired.

As far as depreciation of physical assets is concerned, the State Docks and Terminals is in almost identically the same position as a public utility. In fact, the State Docks and Terminals might well be considered a public utility as far as the question of maintenance and operation expenses is concerned. The principles announced by the above authorities are as applicable to the State Docks and Terminals as to public utilities.

Both the Federal and State governments, in enacting the income tax laws, recognize the fact that depreciation is an item to be considered in determining the maintenance and operating expenses of a business, and for this reason allow depreciation of physical assets to be made in computing income tax.

In view of the above authorities and conclusions, it is my opinion that depreciation is an item that should be set up by the Department of State Docks and Terminals of Alabama as part of the maintenance and operation expenses incurred in the operation of the State Docks and Terminals. A contrary conclusion would lead to the eventual depletion of the physical assets of the State Docks and Terminals.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 5, 1947.

Hon. C. M. Garrett, Sheriff,
Cherokee County,
Centre, Alabama.

Local Acts 1943, p. 78—Cherokee County—Sheriff—Code 1940, Tit. 29, § 102; Tit. 45, § 211; Tit. 15, § 432—Reward in Distilling Cases—Transportation of Insane Persons.

Sheriff of Cherokee County is entitled to keep for himself, in addition to salary, rewards for furnishing evidence and obtaining convictions for distilling, as provided by Code 1940, Tit. 29, § 102, and compensation also for transporting insane persons whom he is deputed to transport to a State hospital for the insane, as provided by Code 1940, Tit. 45, § 211, and Tit. 15, § 432.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1947, is as follows:

“The various officials of Cherokee County, Alabama, are on salary, the amounts of their respective salaries being fixed by Senate Bill 210, page 78, of the local Acts of Alabama of 1943.

“Section One of said Act provides that the ‘salary of the Sheriff shall be \$2500.00 per annum, net’ and Section Three of said Act provides that ‘the Board of Revenue or like governing body of Cherokee County shall provide each of said officers named in Section One, of this Act, with the necessary offices, books, stationery, office equipment, supplies, files, furniture, typewriters, adding machines, postage and other conveniences and equipment necessary for the proper and efficient conducting and handling of the affairs of said office.’

“Section Three of said Act further provides that ‘the Board of Revenue or other like governing body shall provide the Sheriff with gasoline and motor oil and automobile expenses for transportation, in the enforcement of the laws of the State and the proper and efficient conduct of his office, in a sum not to exceed \$100.00 per month, to be paid by properly receipted bills and vouchers presented for payment each month.’

“Section Five of said Act provides that ‘the salaries or compensation herein fixed shall be in lieu of all fees, compensations and allowances heretofore allowed and paid to each or any of said above named County officials of Cherokee County, Alabama,—that the Sheriff shall not receive any compensation for ex officio services rendered by him.’

"Please advise me as follows:

"1—Am I as Sheriff of Cherokee County, Alabama, entitled to compensation for the removal of insane persons from Cherokee County, Alabama, to the various state institutions to which they may be committed?

"2—Am I as Sheriff as aforesaid entitled to the \$50.00 fee provided for the capture and conviction of distillers?"

In *Dallas County v. Kennedy*, 246 Ala. 558, 21 So. 2d. 678, it was held that payments or "rewards" made to "the sheriff or other officer or person" for furnishing evidence and obtaining convictions pursuant to Code 1940, Tit. 29, § 102, were not fees, commissions, allowances or other compensation provided by law and required to be covered into the county treasury under Constitutional Amendment XLVI, and that such rewards might therefore be kept by the sheriff in addition to salary.

The nature of such payments or "rewards" was considered also in *Mosely v. Kennedy*, 245 Ala. 448, 17 So. 2d. 536, and a distinction was drawn as between them and other forms of compensation to the sheriff such as fees. It was said that payments under Title 29, § 102, *supra*, were rewards "to spur individual initiative and diligence, whether the individual acts in an official or private capacity." (Emphasis added.) See also *Quarterly Report Attorney General*, Vol. 36, p. 23.

The same principle may be applied, I think, where the judge of probate, pursuant to Code 1940, Tit. 45, § 211 "deputes" the sheriff to convey an insane patient to a state hospital for the insane, inasmuch as he acts in such cases in a private and not in an official capacity. In such cases, however, transportation costs such as gasoline and motor oil should be charged against the county only for indigent patients as provided in the statute.

Each of your questions is therefore answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 6, 1947.

Hon. Bert E. Thomas,
Director of Conservation,
Division of State Lands,
Montgomery, Alabama.

Oysters less than three inches in length cannot be removed from reefs in contravention of Title 8, Section 153, Code of Alabama 1940, unless for purposes of "transplanting" in the manner prescribed by the Code.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 29, 1947, is as follows:

"Section 4, Title 8 of the 1940 Code of Alabama gives the Department of Conservation full jurisdiction and control over all seafoods existing or living in the waters of Alabama, and of all public and natural oyster reefs and oyster bottoms of the State. Under this section, the Department has full authority to regulate the taking or catching of oysters from these natural reefs and by such means and manner which the Director of the Department deems to be to the best interest of the public welfare.

"A study of the conditions of the oyster reefs extending from Cedar Point to Dauphin Island has disclosed that it would be to the best interest of the oyster industry to thin certain parts of this reef so that the oysters would not accumulate upon one another, forming a natural smothering process and resulting in self extinction.

"Based upon this disclosure of the existing conditions, I would like to permit the taking of oysters from these particularly described reefs in order to better them and prevent the destruction of the reefs as oyster producing by the over accumulation of same.

"I would like to call your attention to Section 153 of Title 8 which prohibits the taking from any reef oysters whose length is less than 3 inches, except for an allowance of 5 per cent. Small oysters are used by seafood processors for the purpose of canning, and it was my idea to allow the oysters which should be thinned from the above described reefs to be used for this purpose only and only for a prescribed length of time. It was also my idea to allow the taking of these smaller oysters, as above pointed out, under the strict supervision of the Department of Conservation.

"I would like your official opinion as to whether or not I have the authority to allow the thinning of certain parts of this designated reef on the grounds that same will be for the betterment of the industry in view of Section 153 which I have referred to above."

Your question is answered in the negative.

Title 8, Section 4, Code of Alabama 1940, referred to, is as follows:

"§ 4. Jurisdiction and authority over seafoods, etc.—The department of conservation shall have full jurisdiction and control of all seafoods existing or living in the waters of Alabama, and of all public and natural oyster reefs and oyster bottoms of the State of Alabama, and it shall ordain, promulgate and enforce all rules, regulations and orders deemed by it to be necessary for the protection, propagation or conservation of same; the department may by order duly made and published prescribe the manner of taking or catching, the time when, and designate the places from which seafoods may or may not be taken or caught, during certain periods of the year, or entirely, as it may deem to be for the best interest of the seafood industry. It shall have full authority to prohibit the catching or taking of oysters from reefs designated by its by order duly made and promulgated during the entire open season or any part thereof, and may open and close said reefs or portions thereof to tonging or dredging, or both, and at any time deemed by it to be to the best interest of the public welfare. It shall receive and audit the accounts of oysters bought and caught of all canners and dealers, and the accounts of all inspectors, employees and members of said department, and of all expenses incident to carrying into effect this title, and shall see that all privilege taxes and license fees are paid, that the inspectors and other officers and employees faithfully discharge their duties, and that all provisions of this title are properly complied with and enforced, and the director shall hear the complaints of any person aggrieved by the action of any officer. It shall have authority to cooperate with the commissioner of the bureau of fisheries of the department of commerce of the United States government in the carrying out of the provisions of any act of congress for the sale, distribution or propagation of all seafoods and the extension of the producing areas thereof. It shall have authority to make rules and regulations requiring all catchers, factories, purchasers, dealers or any persons dealing in shrimp and oysters to make reports to the department, containing the number of barrels caught or sold, and any other information said department may require; to designate the dates for opening and closing of the seasons for catching shrimp and the waters from which the same may be taken. To cause surveys to be made of the coastal regions of the State of Alabama for the purpose of determining the economic soundness of the development of the oyster industry in the location; to make plans and estimates of the cost of such developments and improvements and in connection therewith to enter on any lands, waters, and premises for the purpose of making such surveys, soundings and examinations."

This statute was incorporated into our 1940 Code as a part of Act No. 169, General Acts 1936-37, Extra Session, being a part of Section 3 thereof. The Act under consideration was approved March 1, 1937.

Title 8, Section 153, Code of Alabama 1940, referred to, is as follows:

"§ 153. Unlawful to sell, etc., oysters under three inches long.— It shall be unlawful for any person, firm, corporation or association to sell or offer for sale, to take from any reef or have in his possession, or to buy or offer to buy any oysters whose length is less than three inches, taking into consideration the five percent allowance heretofore provided for."

This statute was incorporated into our 1940 Code likewise as part of Act No. 169, General Acts 1936-37, Extra Session, being Section 38 thereof. Thus, it is seen that both statutes are a part of the very same Act.

The law is well settled that where there is in the same statute a specific provision and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision.

50 Am. Juris, "Statutes," Section 364;

Paterson v. Wisener, 218 Ala. 137, 117 So. 663;

25 R. C. L. 1010, Section 250;

Atkins v. Fibre Disintegrating Co., 21 Lawyers Edition 841;

McKee v. United States, 164 U. S. 287.

The authorities appearing conclusive on this point of law, it is, therefore, my opinion that your question is properly answered in the negative.

You word your request for an opinion in part as follows:

"I would like to permit the taking of oysters from these particularly described reefs * * *"

The word "taking" as used by you indicates the contemplation of complete removal of the oysters under consideration and my answer has been predicated on such a construction.

If mere "transplanting" were contemplated your attention is directed to Title 8, Sections 132 and 133, Code of Alabama 1940, which reads as follows:

Title 8, Section 132:

"Taking seed oysters.—Under its supervision and direction the department may permit owners or lessees of oyster bedding grounds to fish from the public reefs unculled oysters to be used as seed, and it shall have authority to designate from what public reefs said seed oysters may be fished and the quantity to be taken therefrom by said person or persons; the limitation as to size shall not apply to seed oysters lawfully fished from the public reefs, but all seed oysters so secured shall be replanted by the person taking them and shall be taken from the reefs in a careful manner so that the merchantable oysters thereon are not injured or destroyed."

Title 8, Section 133:

"Cultivation of public reefs; transplanting and spreading oysters and shells.—During the closed season, as defined by order of the department, the chief enforcement officer, under the direction and control of the department, shall employ boats, crews and laborers and shall cultivate the public reefs of the state, and shall dredge the oysters in the Alabama waters from places where they are too thick, and shall spread them on reefs where they are too thin, and the department in cultivating the reefs, transplanting and spreading oysters and shells, may expend such sums as it may deem proper. In taking seed oysters, care shall, however, be used so as not to injure or destroy the merchantable oysters on the reefs from which they are taken, and the same shall, unless it is practicable and safe to dredge, be tonged from the 'cooner' or seed reefs."

It can be seen that the thinning of reefs you refer to might be accomplished in the manner prescribed in the foregoing Code sections if mere "transplanting" of oysters or oyster seeds were contemplated.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 10, 1947.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Attorneys—Licenses—Veterans—Exemptions—Title 51, Section 460, Code 1940—General Acts 1945, p. 570.

Exemption from attorney's license levied under Title 51, Section 460, Code 1940, is based upon "admission to the bar" rather than practice of law. An attorney who has been admitted to the bar but does not begin the practice of law until after the expiration of the exemption period provided in Title 51, Section 460, Code 1940, is not entitled to said exemption.

A veteran is entitled to exemption from attorney's license under the provisions of Act No. 353, General Acts of 1945, p. 570, provided he can meet exemption requirements set out in said Act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 1, 1947, is as follows:

"We have a young attorney in this county that was admitted to the State Bar in June of 1943. He immediately entered the service and did not engage in the practice of law until recently. Is he entitled to the two year exemption allowed under Section 460. If so, at the end of the two year exemption would he be allowed the three years exemption under the Veterans exemption bill."

Section 460, Title 51, Code of Alabama 1940, the section referred to in your letter, provides in part as follows:

"§ 460. Attorneys.—Each attorney engaged in the practice of law shall pay an annual license of twenty-five dollars to the state, but none to the county. If such business is conducted as a firm or as a corporation in which more than one lawyer is engaged, each lawyer shall pay such license; but no lawyer shall be required to pay a license until the first day of October following the expiration of two years from his admission to the bar. * * *"

It will be seen from Section 460, supra, that the exemption under consideration is based upon "admission to the bar" rather than the practice of law. The period of exemption is to the first day of October "following the expiration of two years" from the admission of the

lawyer to the bar. If a lawyer does not begin the practice of law until after the expiration of the period of exemption, he is not entitled to the exemption under consideration.

In view of the above conclusion, it is my opinion that the attorney referred to in your inquiry, having been admitted to practice law in June, 1943, is not entitled to the exemption provided in Section 460, *supra*.

However, it is my further opinion that the attorney under consideration is entitled to the exemption from an attorney's license under the provisions of Act No. 353, General Acts of 1945, page 570, if such attorney can meet the requirements set out in said Act necessary to claim an exemption from business or occupational license taxes.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 10, 1947.

Hon. J. D. Sullivan, Chief,
Division of Audits and Inspection,
Department of Corrections and Institutions,
Montgomery 4, Alabama.

Department of Corrections and Institutions—Funds of deceased convict—Title 16, Section 10, Code of 1940.

Funds in the hands of the Department of Corrections and Institutions belonging to estate of deceased convict should only be paid to administrator duly appointed by the probate court to administer estate of the deceased convict.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 23, 1947, is as follows:

"We had an inmate at our Atmore Prison who died in December, 1946, and left money on deposit in the amount of \$486.71. This inmate has a living son in San Antonio, Texas, who wants possession of this money and we would like a ruling from you as to just what procedure is necessary before we can release the money.

"For your information we are attaching hereto a copy of the letter from Major Luke G. Mathews suggesting a certain procedure; however, we will not attempt to do anything until we get a ruling from you."

In answer to your inquiry, your attention is called to Title 16, Section 10, Code of Alabama 1940, which section is in part as follows:

"§ 10. Distribution of personal estate.—The personal estate of persons dying intestate as to such estate, after the payment of debts and charges against the estate, is to be distributed in the same manner as his real estate, and according to the same rules; * * *"

In the case of **Sovereign Camp, W. O. W. v. Snider**, 227 Ala. 126, 148 So. 821, the court, in considering the above statute, held:

"And it is well settled, that as to personal assets, not exempt from administration and the payment of debts or charges against the estate, the legal title at the death of the intestate passes to the personal representative; that the interests of the distributees are secondary and are not converted into unqualified ownership except through the process of administration." (Citing numerous cases.)

In the case of **Costephens v. Dean**, 69 Ala. 385, the court said:

"As a general principle, the law recognizes an executor or administrator as the only representative of the personal assets of a decedent. * * * In trust he holds them, first for the payment of debts, and secondarily, in cases of intestacy, for distribution to the next of kin, or where they have been bequeathed, for the benefit of legatees. The trusts are charged upon the legal title, and that resides solely and exclusively in the personal representative, until distribution is made, or by an assent to legacies, he may part with it.

"* * * They (legatees and distributees) have no title to the assets, and are not appointed by law to demand or receive them; all their interest is secondary, and is capable of conversion into unqualified ownership, only through the process of administration. * * *"

In answering your inquiry, it is assumed that the funds belonging to the deceased convict are funds that are not exempt from administration and the payment of debts or charges against the estate of said convict.

It will be seen from Section 10, *supra*, and the cases cited, that the distributees of the estate of the deceased convict may acquire title to a distributive share of the assets of said estate only through the process of administration.

The proper procedure in this matter is for the distributees to have an administrator appointed by the probate court to administer this estate. The funds may then be paid by you to such duly appointed administrator to be administered as provided by law.

There is no statute in Alabama authorizing the procedure suggested by the copy of the letter from Major Luke G. Mathews attached to your request.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 10, 1947.

Hon. A. R. Meadows, Superintendent,
Department of Education,
Montgomery 4, Alabama.

EDUCATION

VACANCIES IN OFFICE OF COUNTY SUPERINTENDENT OF EDUCATION

1. A person elected to the office of county superintendent of education in the November election of 1946, whose term of office begins July 1, 1947, cannot resign from that office prior to July 1, 1947, and prior to being inducted into the office.

2. A vacancy in the office of county superintendent of education is filled by the county board of education, but if it fails to do so within thirty days from the date of the vacancy, the State Superintendent of Education shall fill the vacancy by appointment.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of January 21, 1947, is as follows:

"Under Local Act No. 162, General Session 1935, approved July 8, 1935, and under General Act No. 569, General Session 1943, approved July 7, 1943, Roy E. Jeffcoat was elected as Superintendent

of Education of Pike County at the General Election on November 5, 1946. The term of the present superintendent of education of Pike County expires June 30, 1947. Mr. Jeffcoat has been appointed Superintendent of Education for the City of Troy. He does not wish

to accept this position until he had discharged his responsibilities in connection with his election as Superintendent of Pike County.

"Your opinion is requested on two points:

"If Mr. Jeffcoat declines this office before July 1, 1947, how would Pike County select a county superintendent of education?

"If Mr. Jeffcoat qualifies and takes office on July 1, 1947, and resigns after that date, how would his successor be named?"

The first question that must be considered is whether or not Mr. Jeffcoat can resign the office of county superintendent to which office he was elected in November 1946, prior to July 1, 1947. It appears that the term of the present incumbent of that office expires June 30, 1947. Mr. Jeffcoat cannot resign from an office, the term of which does not begin until July 1, 1947, for at least two sound reasons. First, the office is being held by one having a legal right to hold it at least until the end of June 30, 1947. Second, Mr. Jeffcoat's term of office to which he was elected in November 1946, does not come into existence until July 1, 1947. His election does not invest him with the office; he must discharge the statutory duties of making a bond and taking the oath of office before he can be inducted into said office.

All of these questions are considered in much detail in the case of *State ex rel. Bland v. St. John*, 244 Ala. 269, 13 So. (2d) 161. It was pressed in this case that the appointing power could anticipate a vacancy, but the court held that such anticipated vacancy is limited to instances in which a vacancy is sure to occur. In the case under review, it is not absolutely certain or sure that a vacancy will occur. Mr. Jeffcoat may and can change his mind, file his bond, take the oath of office and enter upon the discharge of his duties.

I shall now consider the question of how to fill a vacancy in the office of county superintendent of education. Title 52, Section 110 of the Code of 1940, vests the county board of education with the power to fill the vacancy, but if it fails to do so within thirty days after the vacancy occurs, then the State Superintendent of Education shall fill the vacancy by appointment. This is true regardless of the cause of the vacancy.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 11, 1947

Hon. D. A. Norton,
Mayor, Town of Town Creek,
Lawrence County,
Town Creek, Alabama.

Acts 1945, No. 366, H. 606—

Acts 1945, No. 353, H. 352—

Licenses—Disabled veteran entitled to twenty-five dollar municipal exemption under Act No. 366, General Acts 1945, page 589, except on rolling store and motor vehicle license, provided his property is not valued at \$5,000.00 or more, or his net annual income is not \$2,500.00, or more, and provided also he is a legal resident of the State of Alabama at the time he applies for license.

Licenses—Veteran of World War II also entitled to thirty-five dollar municipal exemption for three years under Act No. 353, General Acts 1945, page 570, except on rolling store and motor vehicle license, provided his property is not valued at \$5,000.00, or more, or his net annual income is not \$2,500.00, or more, and provided also he is a legal resident of the State at the time he applies for license.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1947, is as follows:

“We have a veteran in our city that has a disability of 25%, and I want to ask what exemption he would be allowed in taking out a Taxi License, say for twelve months or for the year 1947.

“Our population is in the range line of population from 500 to 1,000.”

Your attention is called to General Acts 1943, page 562, which in pertinent part reads as follows:

“Veterans exempt.—Every bona fide permanent resident of the State of Alabama who served as an enlisted man in the United States army, navy, or marine corps during the World War between April 6, 1917, and November 11, 1918, or in the Spanish-American War between April 21, 1896 and July 4, 1902, or who served as an officer or enlisted man in the army or navy of the Southern Con-

federacy during the Civil War, or any soldier, sailor or other person serving in the armed forces of the United States between December 7, 1941 and the termination of the existing war by the signing of a definite treaty of peace, and who, at the time of his application for license, as hereinafter provided for, shall be physically disabled to the extent of twenty-five per cent, or more, shall, upon sufficient identification and upon sufficient proof of such disability and upon sufficient proof of being a permanent resident of this state, and upon the production of an honorable discharge or other proof of the termination of honorable service from the United States army, navy or marine corps during the World War, or Spanish-American War, or the armed services of the United States, within the respective limits hereinabove prescribed, or from the service of the Southern Confederacy during the Civil War, be exempt from business or occupational license taxes to the extent, and subject to the conditions hereinafter specified. Provided that no exemption, deduction or commutation shall be allowed any person from the license or tax on what is commonly known as rolling stores; nor shall said exemption, deduction or commutation be construed as relieving any person from the payment of any license tax for registration or operation of any motor vehicle upon the public highways of this state."

By Act No. 366, General Acts 1945, page 589, the above Act was amended in part as follows:

"Each such person who shall engage in, or carry on, in his own name, any businesses or occupations as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper, or apprentice, for which businesses or occupations license taxes are prescribed by any municipality of Alabama, shall be entitled to licenses from such municipality to so engage in, or carry on, such businesses or occupations upon payment of the license taxes so prescribed, less all, or such portion of, such license taxes as shall not exceed twenty-five dollars."

Therefore, you are advised that a veteran having twenty-five per cent disability is entitled to a twenty-five dollar exemption of municipal licenses under the above legislation.

In addition, your attention is directed to Act No. 353, General Acts 1945, page 570, which reads in pertinent part as follows:

"Every bona fide permanent resident of the State of Alabama who has served 60 days or more in the armed forces of the United States between September 16, 1940, and the termination of the existing war by the signing of a definite treaty of peace shall, upon sufficient identification, upon sufficient proof of being a permanent resident of this state, and upon the production of an honorable dis-

charge from or other proof of the honorable termination of service including such service in the armed forces, be exempt from business or occupational license taxes for a period of 3 years after the effective date of this article or for a period of 3 years after his discharge from or termination of service including such service, whichever is the later, to the extent and subject to the conditions herein specified. No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle."

"Municipal license.—Each such veteran who shall engage in or carry on any businesses or occupations for which license taxes are prescribed by any municipality in Alabama shall be entitled to licenses from the municipality to engage in or carry on those businesses or occupations upon the payment of the license taxes prescribed, less, as regards each veteran, such portion of the license taxes as shall not exceed \$35.00. However, no such veteran may claim the exemption in more than one municipality."

Both of the Acts above mentioned carry provisions that veterans owning real or personal property valued at \$5,000.00, or more, or having net annual incomes of \$2,500.00, or more, are not entitled to the exemptions set forth, and your attention is specifically directed to these qualifying provisos.

The phraseology in both Acts, "nor shall the exemptions herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle," is, in my opinion, conclusively intended to relate to the motor vehicle itself, and is not directed at the occupation or vocation of operating a taxi business.

In Quarterly Report of the Attorney General, Volume 40, page 50, this office held:

"Disabled veteran of World War II entitled to twenty-five dollar exemptions under Act No. 366, supra, and also, for three years, to thirty-five dollar exemptions under Act No. 353, supra, and to apply such exemptions in payment for two or more licenses, except rolling store and motor vehicle licenses, provided his property is not valued at \$5,000.00, or more, or his net annual income is not \$2,500.00, or more, and provided also he is a legal resident of the State at the time he applied for license."

You are advised, therefore, that if the disabled veteran you refer to is a disabled veteran of World War II, and comes within the qualifications noted, he is entitled to a twenty-five dollar exemption under

Act No. 356, and a thirty-five dollar exemption under Act No. 353, or a total exemption for the year of sixty dollars.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947

Hon. W. H. Wilson,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Probate Judges—deeds, mortgages, and other instruments—
certified copies thereof.

Section 98, Title 47, Code of Alabama 1940.

Probate Judge may legally issue certified copies of deeds, mortgages, soldiers' discharges or other instruments which have been filed in the office of Probate Judge for record prior to the actual recordation of such instrument.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 3, 1947, is as follows:

"When any papers, such as deeds, mortgages, soldiers' discharges or other instruments in writing, are filed in the Judge of Probates office to be recorded is it legal to issue certified copies before any such papers have been recorded?"

My answer to your inquiry is in the affirmative.

Your attention is directed to Title 47, Section 98, Code of Alabama 1940, which reads as follows:

"§ 98. Delivery operates as record.—The conveyance or other instrument is operative as a record from the day of the delivery to the judge; and any one delivering a conveyance or other instrument for registration may require a receipt for same, describing it by date, parties thereto and property conveyed or described."

The above quoted code section specifically provides that the conveyance or other instrument is operative as a record from the day on

which such conveyance or other instrument is delivered to the probate judge for recordation.

In other words, any conveyance or other instrument actually delivered to you as probate judge, under the provisions of the above code section, has the legal effect of becoming a record in your office regardless of whether or not such instrument has actually been recorded in the book kept for such purpose in your office. *Heflin v. Slag*, 78 Ala. 180; *Leslie v. Hinson*, 83 Ala. 266, 3 So. 443; *Truss v. Harvey*, 120 Ala. 636, 24 So. 927.

Title 47, Section 99, Code of Alabama 1940, requires that the several probate judges over the State must permit all persons to have free access to books in their office, during office hours, and must furnish transcripts therefrom, with certificates, when required by any person, upon the payment of lawful fees.

You are, therefore, advised that, in my opinion, it is legal for you to issue certified copies of any instrument which has been filed in your office for record regardless of whether or not such instrument has actually been recorded in your office.

The only difficulty in this regard is for you to ascertain in advance what record and page such instrument will appear when it is actually recorded and show such book and page on the certified copy of the instrument.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947

Hon. Roy D. Gist, Chairman,
Board of Revenue,
Jackson County,
Scottsboro, Alabama.

Act No. 335, H. 640, Local Acts 1945.

Manner of presentation of purchase requisitions to Board of Revenue in absence of Supervisor of Roads and Bridges, as authorized by Local Act of Jackson County, deemed discretionary with Board of Revenue so long as enumerated requirements of Act are met.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 1, 1947, is as follows:

"Under date of September 30th, 1946, you rendered an opinion that the Chairman of the Board of Revenue of Jackson County was not required to employ a supervisor of roads and bridges.

"Please render your opinion on the following question.

"When the Board of Revenue operates without a supervisor will it be legal for the Board members themselves or foremen appointed by the Board of Revenue to issue and sign purchase requisitions asking the Chairman to purchase material, supplies and machinery (with the approval of the Board)?"

My answer is in the affirmative.

The question you present evolves from the interpretations of authority contained in a Local Act of Jackson County effective July 1, 1946. (Local Acts, 1945, page 162.)

The letter of this office dated September 30, 1946, that you refer to, held that Section 11 of the above Act authorized, but did not require, the Board of Revenue to appoint a Supervisor of Roads and Bridges.

In Section 6 of the Act, the following is noted:

"The Board of Revenue shall have the same powers, duties, limitations and responsibilities, insofar as they are consistent with the provisions of this Act, as have Courts of County Commissioners in other counties of Alabama. * * *"

By Title 23, Section 43, Code of Alabama 1940, the following authority is given courts of county commissioners:

"Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as

may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

It can thus be seen that broad powers are conferred upon the Board of Revenue of Jackson County in the matter of road maintenance and construction. While Section 11 of the local act referred to, authorizes, but does not make it mandatory to employ a Supervisor of Roads and Bridges, it would conclusively appear that in the event no supervisor were appointed, the handling of purchases, labor contracts, etc., would rest with the Board of Revenue in the manner prescribed by the Act.

The handling of purchases of material, supplies and machinery is outlined in Sections 7 and 8 of the Local Act, which we quote:

"Section 7. All purchases of, contracts for, or leases of personal property, by or on behalf of the Board of Revenue of Jackson County, shall be made through the Division of Purchases and Stores of the Department of Finance of the State of Alabama except as such purchases, contracts, or leases may be made at not greater cost through other means. However, in the event of an emergency making it necessary that personal property be purchased, leased, or contracted for without delay which would occur because of purchase, lease, or contract through the Division of Purchases and Stores, such purchase, lease or contract may be made through other means. All purchases, leases, and contracts not made through the Division of Purchases and Stores, before payment of them can be made, shall be certified by the Division of Purchases and Stores: (1) either to have been made at cost not greater than that available by purchase, lease, or contract through the Division of Purchases and Stores; (2) or to have been made at reasonable cost in an emergency making it necessary to avoid delay, detrimental to the people of Jackson County, which would have been occasioned by purchase, lease, or contract through the Division of Purchases and Stores. The Chairman or any other member of the Board of Revenue and any employee of Jackson County shall not be directly or indirectly interested in any purchase of, contract for, or lease of personal property by or on behalf of Jackson County.

"Section 8. All purchases, leases, contracts for purchases, contracts, for work or labor, and contracts for the expenditure of money, by or on behalf of Jackson County, amounting to \$100.00 or more, in addition to full compliance with Section 7 of this act, shall have, in advance of their making, the approval of the Board of Revenue, which must appear on the minutes of the Board of Revenue. However, in the event of an emergency necessitating that such purchases,

leases, or contracts be made without delay which would be occasioned by the prior approval of the Board of Revenue, if the purchases, leases, or contracts are reported in writing and in detail to the Board of Revenue within three days after their making by the person authorized to make the same, they may become valid and binding provided they meet the requirements of Section 7 of this act."

Insofar as presentation of requisition purchases does not conflict with Sections 7 and 8 of the Local Act referred to, it would appear that any system devised by the Board of Revenue in the absence of a Supervisor of Roads and Bridges, such as the presentation of purchase requisitions by board members or foremen, is authorized.

Your question is, therefore, answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Counties—Sheriffs—Radios.

County may furnish radio equipment to be installed in automobiles owned and operated by the sheriff in the regular pursuit of his duties in detecting crime and apprehending criminals.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1947, is as follows

"Will you please render me an opinion on the following question:

"Is it legal for the Court of County Commissioners to appropriate funds out of the treasury if the County, or any other funds that may be available, for the purchase of radio equipment to be installed in automobiles owned and operated by the Sheriff of the county in the

regular pursuit of his duties in detecting crime and apprehending criminals?"

I am of the opinion that your inquiry should be answered in the affirmative.

Under Sec. 398 of Title 15, Code of 1940, the sheriff is the principal conservator of the peace of the county, and it is his duty to suppress all riots, unlawful assemblies and affrays.

The duties of the sheriff are enumerated in Sec. 5, Title 54, Code of 1940. Subsection 4 of said section provides as follows:

"(4) It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor for the county, or if there is an inferior or special statutory court within the county in which a solicitor prosecutes criminal cases, then to such solicitor."

Also under Section 9 and 10 of Title 54, Code of 1940, certain investigations are authorized and the expenses of same are paid for the county.

From the above it appears that certain duties are imposed upon the sheriff in connection with enforcement of the criminal laws in the State of Alabama.

Since these duties are imposed upon the sheriff, it follows that the county may make reasonable expenditures in connection therewith. In other words, such expenditures, although not directly authorized, would be proper by necessary implication. *Ensley Motor Car Company v. O'Rear, Treas.*, 196 Ala. 481, 71 So. 702. Cf *Yielding v. Ball et al*, 205 Ala. 376, 87 So. 785. In the enforcement of such duties the use of the radio equipment, as described in your inquiry, would properly and probably be essential in some instances, and, in my judgment, the county governing bodies are authorized to provide the same. This is particularly true in this modern day of gangsters and organized crime, and modern methods should be employed in detecting crime and apprehending criminals. *Quarterly Report of Attorney General*, Vol. 10, p. 87.

Yours very truly,

A. A. CARMICHAEL.

Attorney General.

February 12, 1947

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Courts of County Commissioners—Counties—Alabama Agricultural Extension Service—Code of 1940, Title 12, Section 12 (17).

Under the provisions of Title 12, Section 12 (17), Code of 1940, county governing bodies may pay for such items as buttons, letter openers and book marks which are presented to Four H Club boys and girls on Achievement Day programs.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 6, 1947, is as follows:

"We have a request from our Farm Agent's office for the Commissioner's Court of Elmore County to pay for small items such as buttons, letter openers, and book marks that are presented to Four 'H' Boys and Girls on Achievement Day programs.

"An appropriation is made each year by the court to our Farm and Home Demonstration Agents for the purpose of paying for supplies used in making demonstrations on farms and in home and for a telephone for their office. We would also like to pay this account as the amount is small and we feel that it is for a good cause.

"Your opinion is requested as to whether or not the Commissioners' Court can legally pay this claim."

In answer to your inquiry, your attention is called to the provisions of Title 12, Section 12, Code of Alabama 1940, which provides in part as follows:

"§ 12. Authority of court.—* * * 17. Where the state or federal authorities have taken up the works of farm demonstration, or the organization of farm life clubs for the promotion of agriculture, to appropriate for aiding in such work such sum or sums as the county commissioners or board of revenue may deem adequate and necessary.

The above section gives to county governing bodies discretionary authority to appropriate such sums to aid in farm demonstration work as they "may deem adequate and necessary." Biennial Report, Attorney General, 1934-36, page 741.

It is my understanding that the Four H. Clubs are organizations in the county through which the Alabama Agricultural Extension Service reaches the future farmers of the State and by the work of these clubs the best methods of farming are taught, thereby promoting agriculture in the county.

In view of the above statute, it is my opinion that the governing body of Elmore County may pay for such items as buttons, letter openers and book marks, which are presented to Four H Club boys and girls on Achievement Day programs.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Counties—County Engineers—Calculating Machines.

County authorized to furnish office of County Engineer with calculating machine. The expense of said calculating machine may be paid from the road and bridge fund of the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1947, is as follows:

"Please give me an official opinion on the following matter:

"The Commissioners Court wishes to buy a calculating machine for our county engineer. Under rulings made prior to this time, we are not given specific authority to buy a machine of this kind to be used by our engineering force. I might state that this machine is necessary in the operation of the county engineer's office and

the Commissioners Court feels that it will be a saving to the county to purchase a machine for use in this office.

"Please advise me if it will be possible for the county to purchase the machine for the purpose outlined above."

I am of the opinion that your inquiry should be answered in the affirmative.

Under the provisions of Section 43, Title 23, Code of 1940, county governing bodies have broad discretionary powers of a quasi legislative nature. In the exercise of the discretionary powers therein granted, it is my opinion that the county governing body may legally purchase a calculating machine for the office of the County Engineer.—**Opinion of the Attorney General** to the Judge and Chairman, Court of County Revenue, Franklin County, under date of January 24, 1947 (Ms). Cf. **Quarterly Report of Attorney General**, Vol. 37, page 99.

The payment for the calculating machine in question, in my opinion, may be made from the road and bridge fund of the county. Of course, any surplus in the general fund of the county may be transferred to the road and bridge fund.—**Section 47, Title 23, Code of 1940**. Cf. **Quarterly Report of Attorney General**, Vol. 19, page 254, and authorities therein cited.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947.

Hon. John H. Garrett, Chairman,
Board of Revenue,
Cherokee County,
Centre, Alabama.

County Board of Revenue—Officers—Sheriffs—Automobile.

The County Board of Revenue of Cherokee County, under the provisions of Act #162, S. 210, Local Acts of 1943, page 78, authorized to purchase an automobile for the use of the sheriff of said county.

Opinion by Assistant Attorney General McQueen.

Dear Sir.

Your request for an official opinion, bearing date of January 22, 1947, is as follows:

"The various officials of Cherokee County, Alabama, are on salary, the amounts of their respective salaries being fixed by Senate Bill 210, page 78, of the local Acts of Alabama of 1943.

"Section One of said Act provides that 'the salary of the Sheriff shall be \$2500.00 per annum, net' and Section Three of said Act provides that 'the Board of Revenue or like governing body of Cherokee County shall provide each of said officers named in Section One, of this Act, with the necessary offices, books, stationery, office equipment, supplies, files, furniture, typewriters, adding machines, postage and other conveniences and equipment for the proper and efficient conducting and handling of the affairs of said office.'

"Section three of said Act further provides that 'the Board of Revenue or other like governing body shall provide the Sheriff with gasoline and motor oil and automobile expenses for transportation, in the enforcement of the laws of the State and the proper and efficient conduct of his office, in a sum not to exceed \$100.00 per month, to be paid by properly receipted bills and vouchers presented for payment each month.' It is the Sheriff's insistence that under this Bill fixing his salary, that the County shall furnish to him for use in the enforcement of the laws of the State and in the discharge of the duties incumbent on him as Sheriff, an automobile to be used by him in the discharge of his said duties.

"Please advise me if the Board of Revenue of Cherokee County, Alabama, under this Act can legally purchase for the Sheriff of Cherokee County, Alabama, an automobile to be used by him in the discharge of the duties connected with the Sheriff's office, said automobile to be and remain the property of said Cherokee County, Alabama."

My answer to your inquiry is in the affirmative.

The effect of Act 162, S. 210, page 78, Local Acts of 1943, is to place the sheriff, among other county officers of your county, on a salary rather than on a fee basis. When the sheriff is taken off the fee system of compensation, in which he must pay all the expenses of his administration of the office, other provisions for such payment must reasonably follow. In this instance such provisions do follow under the provisions of Section 3, of Act 162, supra, wherein it is provided that the Board of Revenue or other like governing body of Cherokee County shall provide the officers named in Section 1 of said Act with conveniences and equipment necessary for the proper and efficient conduct of handling the affairs of said office.

One of the duties imposed on a sheriff is to execute with due diligence the processes and orders of the courts of record of this state and of officers of competent authority. This, of necessity, requires prompt action and ready transportation to the different parts of the county.

The Legislature, by fixing the salary of the sheriff at twenty-five hundred dollars per annum by Act 162, *supra*, did not, in my opinion, contemplate that the sheriff out of this annual salary should pay the expenses of his office, including a means of transportation to the various parts of the county in the performance of his duty. Had they intended that the sheriff should so pay such expenses then they would have fixed his annual compensation at a much higher figure. To require the sheriff to furnish his own automobile and other expenses out of his salary would soon exhaust it and leave nothing for the office.

When the Legislature provided, by said Section 3 of Act 162, *supra*, that the Board of Revenue of your county should provide other conveniences and equipment necessary for the proper and efficient conduct in handling the affairs of the office of the sheriff, in my opinion, they intended to authorize the county governing body to provide transportation for the sheriff, for certain it is he could not efficiently conduct and handle the affairs of his office without an automobile.

You have called attention to that part of Section 3 of Act 162, *supra*, where the governing body of your county shall provide the sheriff with gasoline and motor oil and automobile expenses for transportation in the enforcement of the laws of the state and the proper and efficient conduct of his office, in a sum not exceeding one hundred dollars per month. This provision of the Act, in my opinion, is not a prohibition against the county purchasing an automobile for the sheriff, but on the contrary is a limitation on the amount that the County Board may allow the sheriff for the operation and other expenses incident to driving his automobile.

It is, therefore, my opinion that the County Board of your county may legally purchase an automobile for the use of your sheriff. *Tuscaloosa County v. Shamblin*, 169 So. 234; *Yielding v. Ball, et al*, 87 So. 785.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 12, 1947.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
Montgomery 1, Alabama.

Act No. 400, S. 173, General Acts 1945.

Appropriation under Act No. 400, General Acts 1945, may, in discretion of State Veterinarian, be used for veterinarian, vaccine, and like expenses, instead of indemnifying purposes by virtue of the wording of the statute.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 4, 1947, is as follows:

"On page 177 of the General Acts of Session of 1945, Item 11 of Section X provides:

" 'For matching Federal funds for the purpose of indemnify-owners of cattle which have been condemned or slaughtered, after having reacted to the test for tuberculosis, paratuberculosis, or Bangs Disease—\$75,000.00.'

"This act was approved June 23, 1945. Subsequently on July 7, 1945, an act on page 619 of the Acts of 1945 reads as follows:

" 'To provide for the vaccination of calves in Alabama against brucellosis or Bang's disease and to appropriate funds therefor during each of the fiscal years ending September 30, 1946 and 1947.'

"My question is whether the \$75,000.00 provided under the appropriation bill may be used under provisions of this act

"(a) to employ veterinarians

"(b) to purchase vaccine and

"(c) to defray any necessary expenses in carrying out the provisions of this act?

"Will you please let me have this ruling at the earliest convenience of your office."

Answers to all three of your questions are in the affirmative.

Section 4 of the Act you refer to as passed on July 7, 1945 (General Act No. 400, S. 173, General Acts 1945) reads as follows:

"Section 4. There is hereby appropriated for carrying out the provisions of this act during each of the fiscal years ending September 30, 1946 and 1947, such part of funds made available by the Legislature to match Federal funds for indemnifying owners of cattle which have been condemned or slaughtered after having reacted positively to the test for tuberculosis, paratuberculosis, or Bang's disease as is not, in the judgment of the State Veterinarian, required for that purpose."

It is seen that such part of the funds noted (\$75,000 by general appropriation bill, Act 145, General Acts 1945), that the State Veterinarian deems not required for indemnifying purposes, is therefore, available for carrying out the provisions of this Act.

The provisions of Sections 1, 2, and 3 of the Act read as follows:

"Section 1. Any person owning cattle in Alabama may have his or her calves vaccinated against brucellosis or Bang's disease when they are from four to eight months of age, at State expense, by applying to the State Veterinarian, if funds are available for this purpose, provided the person will have all of his or her calves, except calves to be slaughtered and males which are to be castrated before they are a year old, vaccinated against brucellosis or Bang's disease.

"Section 2. The State Veterinarian, at his discretion, may require that all calves or any calves, except those to be slaughtered for veal or males that are to be castrated before they are one year old, in any county of Alabama must be vaccinated against brucellosis or Bang's disease. Vaccination required under this section shall be at State expense.

"Section 3. Vaccinations herein provided for shall be done by the State Veterinarian or his assistants, by veterinarians employed by the Federal Bureau of Animal Industry, by veterinarians qualified to practice in Alabama, or by any other person, qualified by experience or training, who is authorized by the State veterinarian. Only vaccine approval by the State veterinarian shall be used. Vaccinated calves shall have a symbol indicating vaccination and the date of vaccination tattooed in one ear and shall be marked for identification by an ear tag or some other method satisfactory to the State veterinarian."

From the above it is apparent that the State may employ necessary veterinarians and purchase necessary vaccines, and your questions (a) and (b) are, therefore, answered in the affirmative.

As noted, Section 4 of Act No. 400 provides that the funds made available are "for carrying out the provisions" of the Act. The necessary expenses arising in connection therewith are, therefore, covered and your question (c) is likewise answered in the affirmative.

It is considered that this opinion in no way conflicts with the con-

trary opinion expressed in Quarterly Report of Attorney General, Vol. XV, p. 55, this by virtue of the passage of the 1945 Act here under consideration.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 19, 1947.

Hon. Frank B. Embry,
County Solicitor,
St. Clair County,
Pell City, Alabama.

Code 1940, Title 13, Section 256.

Deputy Solicitor—not authorized to accept compensation from clients for services rendered in assisting circuit solicitor in the prosecution of criminal cases in the circuit court of the county for which appointed, nor in the circuit courts of the other counties of the judicial circuit.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 25, 1947, is as follows:

“Will you be kind enough to advise me as to the proper procedure in the following situation:

“Since leaving the Circuit Solicitor's office, I have been approached by several parties to employ me to assist my successor in the Circuit Solicitor's office in the prosecution of cases, but in the meanwhile I have accepted the place as Deputy Solicitor for this County only.

“What I would like to know is, if there are any ethical or official rules to prevent me from accepting compensation in the Circuit Court, in assisting the Circuit Solicitor in the prosecution of cases? As I view the matter, the duties of the Deputy Solicitor, under the statutes, only cover his cases in the County Court, unless he is called upon by the Circuit Solicitor for assistance with the Grand Jury or trial of cases in the Circuit Court.”

As I understand your letter, you inquire as to whether or not there is any prohibition against you, while holding the office of Deputy Solicitor

of St. Clair County, accepting compensation from clients for your services in assisting the Circuit Solicitor in the prosecution of criminal cases in the Circuit Court of St. Clair County?

I am of opinion that such prohibition does exist and that you are not entitled to additional compensation for services rendered by you in assisting the Circuit Solicitor in the prosecution of criminal cases in the Circuit Court of the county for which you have been duly appointed deputy solicitor.

Tit. 13, Section 256, Code of Alabama 1940, provides for the appointment, by the circuit solicitor, of a deputy solicitor in each county of his circuit, and prescribes the duties of persons so appointed as deputy solicitor. This statute reads as follows:

"Deputy solicitors appointed; removal—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit, to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

It is also prescribed by Tit. 13, Section 229, Code of Alabama 1940 that,

"It is the duty of the circuit solicitor, deputy circuit solicitor, assistant deputy circuit solicitor, county or other solicitor by whatever name called, within the circuit, county, or other territory for which he is elected or appointed:

* * * * *

"2. To draw up all indictments and to prosecute all indictable offenses.

* * * * *

"6. To attend each special session of the circuit court held for the trial of persons charged with criminal offenses; * * *

* * * * *

"11. They shall go to any place in the State of Alabama and prosecute any case or cases or work with any grand jury when called upon to do so by the attorney general or governor of the State of Alabama, and shall attend sessions of courts and transact all of the duties of the solicitor in such courts when called upon by the attorney general or the governor to do so."

There is also a local law governing the office of Deputy Solicitor of St. Clair County, found in Local Acts of 1935, Act 294, p. 188. However, such local act effects no material change in the provisions of Tit. 13, Sec. 256, quoted above. Said local act merely fixes the salary of the

Deputy Solicitor of St. Clair County at \$1,200 per annum and likewise prescribes that such officer shall do and perform all the acts and duties as are now required of him, or as may hereafter be required of him, as provided by law.

Construing the provisions of the above quoted sections of Tit. 13 of the 1940 Code, and likewise the provisions of the local Act relative to the office of Deputy Solicitor of St. Clair County, it is apparent that it is the duty of such person appointed to the office of deputy solicitor "to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor * * *." (Emphasis added.)

It therefore appears to me that it is the duty of the deputy solicitor to assist the circuit solicitor in all proceedings in the circuit court of his county, if the circuit solicitor deems such assistance necessary. For rendering this and other prescribed services, such officer is paid a salary prescribed by law. It being one of the duties of the deputy solicitor to render such assistance, it is my opinion that such officer would not be entitled to additional compensation, from any source, for performing such duties.

It is, therefore, my opinion that the answer to your question must be to the effect that you, as Deputy Solicitor of St. Clair County, are not authorized or entitled to accept additional compensation from clients for services rendered by you in assisting the circuit solicitor in the prosecution of criminal cases in the Circuit Court of St. Clair County.

Although not specifically raised by your inquiry, I feel that the question naturally arises as to your legal right, or authority, to accept compensation from clients for services rendered in assisting the circuit solicitor in the prosecution of criminal cases in the circuit courts of the other counties of the judicial circuit of which St. Clair County is a part.

I am of the opinion that such would be inconsistent with your position as Deputy Solicitor of St. Clair County and that you are not legally entitled to additional compensation for rendering such services.

My construction of Tit. 13, Sec. 256, Code of Alabama 1940, is to the effect that the services that may be requested of you by the circuit solicitor with reference to proceedings in circuit court are not specifically restricted to the county for which you have been appointed deputy solicitor. It is my opinion that should the occasion arise, justified by all the surrounding circumstances, the circuit solicitor could request you to perform such services, in the circuit courts of the other counties of the judicial circuit. Such should not be the general practice but, as stated, in case of emergency, or in any other situation justified by the cir-

cumstances of the case, it is my opinion that the circuit solicitor would be authorized to call upon you to render such services and perform such duties in the circuit courts of the other counties of the judicial circuit.

Also under the authority of Tit. 55, Sec. 236, Code of Alabama 1940, the Attorney General is vested with the authority to direct any solicitor to aid and assist in the investigation or prosecution of any cause in which the state is interested, in any other circuit or county than that of the solicitor so directed.

The provisions of this statute, in full, are as follows:

"Attorney general may advise or direct solicitor—The attorney general shall give the solicitors of the several circuits any opinion, instruction or advice necessary or proper to aid them in the proper discharge of their duties, either by circular or personal letter, and may direct any solicitor to aid and assist in the investigation or prosecution of any cause in which the state is interested, in any other circuit or county than that of the solicitor so directed. Such solicitors shall have and exercise in such other county or circuit all the powers and authority imposed by law upon the solicitor of such other county, or circuit; but this section shall not abridge any authority which may have been or which may be vested in the chief justice of the supreme court, nor shall the attorney general, or any assistant of the attorney general, or other person at the instance or request of the attorney general be authorized to appear or in any way act in the name of the state in civil suit or proceeding by or against any county or county officer in which the State of Alabama has no direct financial interest."

That such statute is as applicable to deputy solicitors as to circuit solicitors is pointed out by the case of *Benton v. State*, 245 Ala. 625, 18 So. 2d. 428. See also Tit. 13, Sec. 229, sub-sec. 11, Code of Alabama 1940, quoted herein.

It is, therefore, my opinion that, in view of the fact that you could be directed, as part of your duties, to appear and assist in proceedings in circuit courts other than that of the county for which you are appointed, you are therefore unauthorized to accept additional compensation from clients for such services, such being in fact part of the statutory duty of your office.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 19, 1947.

Hon. F. B. Lloyd,
Judge of Probate,
Crenshaw County,
Luverne, Alabama.

Jury Commission—Probate Office—Chief Clerk

Chief Clerk in the office of the Judge of Probate may not at one and the same time serve as a member of the Jury Commission.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1947, is as follows:

“Please give me an official opinion on the following:

“Is it legal for the Chief Clerk of the Probate Judge’s Office to serve as a Jury Commissioner for the County.”

My answer to your inquiry is in the negative.

Your attention is called to Section 9, Title 30, Code of Alabama 1940, which reads as follows:

“§ 9. Membership, etc. of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever.”

The above code section states in plain, unambiguous and unmistakable language, that members of the jury commission shall not during the term for which they are appointed or during their tenure in said office hold any other office by appointment or election or perform any other public duties under the federal, state, county or municipal government, which carries with it any compensation whatsoever.

Certain it is that the chief clerk in the office of the probate judge is an appointed office; he performs public duties, even to the extent in certain cases performing the duties of the probate judge himself; and

the office of chief clerk is an office which carries with it some compensation.

It, therefore, of necessity follows that the chief clerk in the office of the judge of probate may not at one and the same time serve as a member of the jury commission.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 20, 1947.

Hon. Roy O. Hill, Clerk,
Circuit Court,
Houston County,
Dothan, Alabama.

Clerk of the Circuit Court of Houston County—Clerk of the Jury Commission—Local Acts of 1945, p. 14.

Local Act of Houston County placing Clerk of Circuit Court of Houston County on salary and requiring fees to be paid to county does not prohibit clerk of circuit court from retaining fees for services as clerk of the jury commission.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 7, 1947, is as follows:

"Title 30, Section 15, provides in part as follows:

"In counties having seventy five thousand population or less by the last federal census preceding the employment, the clerk of the circuit court may be employed as the clerk of the jury commission - - - -"

"In Local Acts of 1945, page 14, House Bill No. 220 by Lee of Houston provides compensation for the Clerk of the Circuit Court of Houston County, and provides his duties for such compensation and reads in part as follows:

"Section 2—That when and after this act goes into effect, said Clerk of the Circuit Court of Houston County, hereinabove referred to, shall continue to collect all legal charges, costs, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall pay same into the county treasury - - - -"

"Under Title 30, there is no doubt but that the Clerk of a Circuit Court may be Clerk to the Jury Board and receive fees allowed by law therefor, but, in considering this in connection with the portion of Local Act quoted above, as well as all of the said local act, could I, as Clerk of the Circuit Court of this County, act as Clerk to the Jury Commission and receive the fees allowed by law therefor, and keep the same instead of turning the same over to the County Treasurer?"

In my judgment the Act placing the Clerk of the Circuit Court of Houston County on a salary and requiring that all fees thereafter collected by him be paid into the county treasury does not prohibit such clerk from retaining those fees paid to him as compensation for his work in acting as the clerk of the jury commission.

The local Act referred to in your inquiry (Local Acts of 1945, p. 14) places the Circuit Clerk of Houston County on a salary, and provides that the clerk shall continue to collect all legal charges, costs, fees, compensation, and allowances heretofore or hereafter authorized to be collected by him, and shall pay same into the county treasury. It is clear to me that the costs, fees, and legal charges referred to in Section 2 of the local Act refer to those costs, charges, and fees pertaining to the office of the clerk of the circuit court.

In other words, the local Act places the circuit clerk on a salary and then requires that all fees which formerly were payable to the clerk of the circuit court must be paid into the county treasury. Only those fees, therefore, that inure to the person who is holding the office of the circuit clerk and which are collected by him as fees payable to him as the circuit clerk are required to be paid into the county treasury.

Of course, the clerk of the circuit also performs the duties as clerk of the county court and Clerk of the Court of Common Pleas of Dothan, as ex officio duties. Therefore, any fees or costs collected in such capacity should be paid into the county treasury, for his compensation for his ex officio duties is also said to be included in his salary.

Title 30, Section 15, Code of Alabama 1940, provides that the clerk of the circuit court may be employed as clerk of the jury commission. This does not mean that it is part of the duties of the circuit clerk to perform as circuit clerk the duties prescribed for the clerk of the jury commission. It is a separate employment. The clerk of the circuit court may accept or refuse the offer for employment as clerk of the jury commission. It is my opinion, however, that if he does accept the separate and independent position of clerk of the jury commission, he is entitled to retain fees and compensation payable to him as the clerk of the jury commission.

Section 2 of the local Act referred to in your inquiry does not touch fees, compensation, and allowances inuring to the person who holds the

position as clerk of the jury commission. Since the clerk of the jury commission, therefore, whether he is the clerk of the circuit court or not, receives his compensation and fees for his employment in another capacity, namely, as clerk of the jury commission, that section of the local Act, Section 2, requiring all fees to the clerk of the circuit court to be paid into the county treasury does not require that those fees and that compensation received in another capacity should be delivered to the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1947.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
Montgomery 4, Alabama.

Nuisance — Public nuisance — Animals — Health — Rabies — Counties—County Board of Health—Title 22, Section 75, Code of Alabama 1940; Title 22, Section 76, Code of Alabama 1940; Title 22, Section 77, Code of Alabama 1940; Title 12, Section 12, Subsection 19, Code of Alabama 1940.

Statutes authorize county board of health to declare foxes likely to be conveyors of rabies a public nuisance and subject to summary abatement.

Counties, upon request of the State Board of Health, are authorized to appropriate funds to exterminate foxes likely to be conveyors of rabies. Title 12, Section 12, Subsection 19, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of January 24, 1947, is as follows:

“Enclosed is copy of resolution adopted by the Greene County Board of Health relating to the control of rabies in foxes. It will be appreciated if you will advise me whether the resolution is sound legally, and if it is permissible for the County Health Officer to be governed by its intent.”

The resolution referred to in your inquiry is as follows:

“Whereas, rabies has been found to be widespread in the fox in Greene County, and

"Whereas, this condition constitutes a nuisance menacing the health of the public as defined in Section 75, Chapter I, Title 22 of the Code of Alabama 1940, therefore

"Be it resolved that this nuisance is ordered abated by the undersigned, constituting the County Board of Health of Greene County, as provided in Section 76, Chapter I, Title 22 of the Code of Alabama 1940, and that in order to further aid in abating this nuisance the following regulations are hereby declared to be in effect until the nuisance is declared by the Green County Board of Health to have been abated, or until April 1, 1947, whichever date is prior, these regulations being authorized by Section 8, Chapter I, Title 22 of the Code of Alabama, 1940, and as otherwise provided by law:

"1. The county health officer is hereby ordered to pay for each fox killed in Greene County the sum of \$2.00 (two dollars) after proof of death of each fox is established to the satisfaction of the health officer. Monies so paid by the county health officer shall be from a special rabies control fund appropriated by the Greene County Commissioners' Court.

"2. The county health officer is empowered to appoint such assistants as may be necessary to abate this nuisance.

"3. All expenses incurred in abating this nuisance, over and above those which would ordinarily incur in the discharge of the ordinary duties and functions of the Greene County Health Department, are to be borne by the above mentioned special rabies control fund.

"4. The county health officer is hereby empowered to issue checks for the above mentioned expenses and for the payment of the killing of foxes as stated above, such checks to be drawn on the Greene County Health Department Rabies Control Fund, and to be signed by the county health officer.

"Be it further resolved that the Greene County Commissioners' Court is hereby petitioned to appropriate funds now, and as may be needed to abate this nuisance, as ordered above.

"Done at Eutaw, Alabama, this the _____ day of December, 1946.

Chairman

Judge of Probate"

In my judgment the foregoing resolution of the Greene County Board of Health is sound legally and it is permissible for the county health officer to be governed by its intent.

Briefly, the resolution provides:

(1) The disease of rabies has been found to be widespread in the fox in Greene County.

(2) The prevalence of this disease constitutes a public nuisance per se menacing public health.

(3) That the nuisance must be abated.

(4) That certain rules to aid in abating the nuisance are effective for a certain time. These rules are as follows:

(a) The health officer must pay \$2.00 (presumably to any person) after that person has proved that he has killed a fox in Greene County.

(b) The county health officer may appoint assistants necessary to abate the nuisance.

(c) Expenses are to be paid from the special rabies control fund.

(d) The health officer is authorized to draw checks on the special rabies control fund.

(5) The county governing body is petitioned to appropriate such special fund.

Title 22, Section 75, Code of Alabama 1940, provides in substance that, "(1) Animals . . . infected with or acting as or likely to act as conveyors of disease or infection whereby they are likely to become menaces to public health . . ." are public nuisances per se menacing public health and unlawful.

It has been held, however, by the Supreme Court in construing subsections 7 and 8 of this Code section that in the absence of a new definition of a public nuisance, a court is the agency to determine whether or not an act or a situation is in fact a public nuisance. *Wheeler v. River Falls Power Company*, 215 Ala. 655, 111 So. 907. In this same decision, the Supreme Court indicated that the Code section defines the power of the board of health and provides machinery for the appropriate exercise of those powers. *Wheeler v. River Falls Power Company*, *supra*.

In my judgment the circumstances described in the attached resolution indicate the existence of a public nuisance in fact, namely, that rabies is widespread in the foxes of Greene County. In my judgment such situation is the same as that described in Title 22, Section 75: "Animals infected with or acting as or likely to act as conveyors of disease or infection."

You are advised, therefore, that it is my opinion that a court would determine that the prevalence of rabies in foxes in Greene County would constitute a public nuisance in fact, and also a public nuisance as defined by subsection (1) of Title 22, Section 75, Code of Alabama 1940. See *City of Selma v. Jones*, 202 Ala. 82, 79 So. 476; *Radney v. Town of Ashland*, 199 Ala. 635, 75 So. 25.

The resolution by the county board of health is merely a formal announcement and evidence that in the opinion of the board of health rabid foxes or foxes likely to be rabid constitute a public nuisance. Once it has been determined that such a situation is a public nuisance, the question arises as to the method to be used for abating that nuisance.

Title 22, Section 76, Code of Alabama 1940, in referring to the preceding section, provides, "Any such nuisance shall be abated by the county board of health and the county health officer in any of the ways provided in this chapter that may be appropriated or in any other lawful manner, including abatement by bill in equity. . . ." Section 77 of this Title provides in part for the destruction of property constituting a nuisance: "When such nuisance consists of one or more of the diseased animals mentioned in this section, . . . and which nuisance in the opinion of the county board of health should be abated by destroying rather than curing or cleansing or disinfecting the animal or animals . . . the county board of health shall, if after a careful investigation of the facts it considers such a course necessary for the protection of the public health, adjudicate such animal or animals, . . . to be such nuisance and order its summary destruction without compensation to the owner thereof. And thereupon the county health officer shall proceed with such destruction, in such manner as reasonably to avoid danger of infection."

Public nuisances are usually abated by a bill in equity. *Ridge v. State*, 206 Ala. 349, 89 So. 742. However, judicial proceedings are not always necessary and public nuisances may be abated summarily. 39 Am. Jur. p. 456, Section 184.

It is useless to argue that the particular nuisance now found to exist in Greene County should be abated by a bill in equity. It would also be useless to argue that the board of health could consider the necessity for destroying each animal as a separate case. It is my judgment, therefore, that under the provisions of Title 22, Sections 76 and 77, the board of health and the health officer may order the summary destruction of all foxes likely to act as conveyors of the disease.

The foregoing resolution indicates to me that the board of health has outlined an appropriate method for the abatement of the nuisance, and it is evident that this particular nuisance must be abated by destruction rather than by curing or cleansing or disinfecting the animal. It is further presumed that the county board of health has made a careful investigation of the facts, since it has found that the disease of rabies is widespread in the county. The necessity for the destruction of such

animals is also found by the resolution to be necessary for the protection of the public health.

It has been held that the legislature may confer on administrative agency the authority to determine the existence of a public nuisance and also confer upon an administrative agency the power to abate that nuisance. *Stockwell v. State*, 110 Texas 550, 221 S. W. 932, 12 A. L. R. 116, 39 Am. Jur. p. 295, Section 15. Statutes authorizing the summary destruction of diseased animals have almost uniformly been upheld. 8 A. L. R. 67, 69.

In my opinion, therefore, the board of health, acting through its county health officer, has complied with Title 22, Sections 75, 76, and 77, and is authorized in ordering the summary destruction of foxes in Greene County.

As to the payment of \$2.00 by the health officer after the proof of the death of each fox, it is my opinion that the county governing body is authorized to appropriate funds for the payment of this and other expenses incurred in carrying out the provisions of the resolution above quoted. Title 12, Section 12(19), Code of Alabama 1940, provides that the commissioners court has authority "to appropriate money to promote and enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the state board of health." You will note, however, that the state board of health must request the county governing body to make this appropriation before the county governing body creates the special rabies control fund.

You are further advised that this opinion should not be so construed as to authorize any person in Greene County or any person in the employment of the county health officer to violate the Alabama hunting and game laws, neither should this opinion be construed to authorize any person to hunt or otherwise trespass on the lands of another without his consent, or to kill the privately owned domesticated animals of another.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 26, 1947.

Ward and Ward,
County Attorneys,
Tuscaloosa County,
Tuscaloosa, Alabama.

Jury Commissioners.

1. Old members of jury commission, whose terms ordinarily expire with Governor appointing them, hold over for a reasonable time or until their successors are appointed and qualified.

2. The hold-over members are entitled to the regular per diem compensation for duties performed, subject to certain maximum limitation of compensation allowable for any term year.

3. The compensation paid to the hold-over members should not be considered in determining the maximum compensation allowable to their successors in any term year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1947, is as follows:

"In Re: Jury Board of Tuscaloosa County, Alabama.

"As we understand Governor Folsom has appointed three members to constitute the Jury Board for Tuscaloosa County, Alabama. These new members of the Jury Board have not yet qualified.

"The question has arisen with the Board of Revenue of Tuscaloosa County, Alabama, as to the amount that should be paid the retiring members of the Jury Board for Tuscaloosa County.

"The new members of the Jury Board for this County have not yet qualified according to information furnished by the Secretary of the Board of Revenue. The old members of the Jury Board, whose term of office should have expired on or about January 20th, 1947, claim that they are holding this office until the members of the new Board have qualified. They have filed a bill or expect to file a bill for services for the time that they hold over and up to the time their successors qualify.

"The Board of Revenue would like to know whether or not these old members of the Jury Board will be entitled to compensation at the regular monthly rate up to the time the new members of the Jury Board qualify."

By the term "jury board," as used in your inquiry, I assume you refer to the "jury commission" under provisions of Chapter 2 (Sections 8-20) of Title 30, Code of 1940. I know of no special or local law applicable alone to Tuscaloosa County.

Based on the above assumption, it is my opinion that the old members of the jury commission would be entitled to their regular authorized compensation under Section 12 of Title 30, Code of 1940, for a reasonable time after the expiration of their term or until their successors have been appointed and qualified.

Section 10, Title 30, Code of 1940, provides as follows:

"§ 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall

constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified."

Under the above section the jury commissioners are appointed by the Governor to hold office "during the Governor's tenure of office." The terms would ordinarily expire when the Governor appointing them left office. However, the Legislature provided for a hold-over period, viz: "and until their successors are appointed and qualified." Therefore, the old jury commissioners may hold over and perform their duties for a reasonable time after a new Governor has taken office or until their successors have been appointed and qualified.—*Quarterly Report of Attorney General*, Vol. 31, page 89.

Compensation of the jury commissioners is provided in Section 12, Title 30, Code of 1940, which is as follows:

"§ 12. Salaries of members.—Each member of the jury commission shall be paid the sum of five dollars per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the commission shall not exceed for any year of his term the following amounts: In counties of twenty-five thousand population or less one hundred dollars; in counties exceeding twenty-five thousand and not exceeding fifty thousand population two hundred dollars; in counties exceeding fifty thousand and not exceeding seventy-five thousand population three hundred dollars; and in counties exceeding seventy-five thousand population six hundred dollars; the population of said respective counties to be determined by the last preceding federal census."

The old members of the jury commission, holding over after the expiration of their term, would be entitled to five dollars per day for the time actually engaged in the discharge of their duties as such members, subject to the maximum limitations as to the total amount receivable in "any term" year based on a population classification. The "term year" runs from the first Monday after the second Tuesday in January until the same time in the following year. Their successors, although not appointed and qualified until a date subsequent to the beginning of the new term, would be entitled to the same compensation. The maximum "term year" limitations are applicable to the individual incumbents and not to the "term year" itself, though the positions be filled by different parties. The compensation paid to the members of the old jury commission should not be considered in determining the maximum amount allowable to their successors in any "term year."—*Quarterly Report of the*

Attorney General, Vol. 15, pages 121 and 249. See also Quarterly Report of Attorney General, Vol. 16, page 293; Quarterly Report of Attorney General, Vol. 32, page 149; Opinion of Attorney General to Chairman, Court of County Commissioners, Russell County, dated Jan. 29, 1947 (in MS).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 26, 1947.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Offices—State Planning Board—Mayors

The holding of the office of mayor of a municipality and a member of the State Planning Board by the same person at one and the same time is not violative of Sec. 280 of the Constitution of 1901.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1947, is as follows:

"Honorable H. R. Summer is the Mayor of the City of Decatur, Alabama, having been elected to that office at the last municipal election by the people of this city.

"Just recently Governor Folsom has named Mr. Summer as a member of the Alabama State Planning Board to which appointment Mr. Summer has not yet accepted.

"Would you please give me the benefit of your official opinion as to whether or not if Mr. Summer should accept the appointment as a member of the Alabama State Planning Board it would be in violation of Section 280 of the Constitution of the State of Alabama.

"Mr. Summer would make an ideal member of this Board, and his friends here are urging him to accept the appointment, but he does not want to do so if it would be in violation of Section 280, so I would therefore appreciate it if you would give me the benefit of your official opinion as soon as possible."

I am of the opinion that your inquiry should be answered in the negative.

Section 280 of the Constitution of 1901 provides as follows:

"Section 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

In order for one to hold "an office of profit under this State" within the meaning of the above quoted constitutional provision, the following three elements must co-exist: (1) He must exercise some part of the sovereign power of the State. (2) He must have a fixed tenure office, and (3) he must receive compensation for the performance of his duties. *Opinion of the Justices*, 244 Ala. 386, 13 So. 2d 674; *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211; *Montgomery v. State, ex rel. Enslin*, 107 Ala. 372, 18 So. 157; *Quarterly Report of Attorney General*, Vol. 18, page 316.

The State Planning Board is created under Act 183, H. 62, approved June 18, 1943, (General Acts of 1943, page 163). The Board consists of the Governor, as Chairman, and six other members appointed by the Governor. These other members have a fixed tenure of office, and receive compensation in the amount not to exceed ten dollars per day for each day they are engaged in the performance of their duties, and are also reimbursed for actual expenses.

The Board's duties are so numerous and vague as to baffle the imagination in an attempt to find where they begin and end. Among other things, it may gather and disseminate information of all kinds relating to the State's resources, may undertake to plan and plot the course of future growth, confer with all kinds of other planning boards, national, federal, interstate, regional, municipal, county and local, and cooperate with them, with a view to co-ordination of plan. It may also advise the legislature on programs for public improvements and the financing thereof; and may prepare and submit to the Governor or the Legislature drafts of legislation for carrying out the master plan or any part thereof; and it may enter into contracts and co-operative agreements with divers and sundry associations, corporations, and individuals for the purpose of disseminating information, inducing the location of business and industrial enterprise, and drawing tourists and new residents to the State. However, there is nowhere any suggestion of an attempt to confer legislative power on the Board. Its functions would otherwise seem to be purely those of an administrative advisory, "fact finding" body with power only to make recommendations, but without power to enforce its recommendations, whether embodied in the master plan or in some fractional part of the plan. *Letter of Attorney General to Governor*, under date of July 18, 1946.

From the above, it will be seen that a member of the State Planning Board meets the second and third requirements of Section 280 of the

Constitution in regard to holding "an office of profit under this State." In my opinion, the first requirement is lacking. The Board does not exercise any part of the sovereign power of the State, as above pointed out. It functions only in an administrative advisory capacity without power to enforce its recommendations.

The premises considered, it is my opinion that a member of the State Planning Board does not hold an office of profit under this State within the purview and meaning of Section 280 of the Constitution. This being the situation, the mayor of a municipality may be a member of the State Planning Board without violating this constitutional provision, regardless of whether or not such mayor be considered as holding an office of profit under this State, a question which is unnecessary to determine.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 26, 1947.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Clerks of Circuit Court—Bailiffs—Clerk of Circuit Court is not responsible for wrongful act of bailiff—deputy clerk, which act was done by said bailiff—deputy clerk, when functioning in the capacity of bailiff only.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request or an official opinion, bearing date of February 4, 1947, is as follows:

"It is and has been a practice in this county for the Clerk of the Circuit Court to appoint, as a deputy clerk to act in his name, one of the bailiffs in each division of the Circuit Court, said bailiffs having been appointed by the respective Circuit Judge under authority of Sections 229-230, Title 62 of the 1940 Code of Alabama.

"I will greatly appreciate an official opinion from your office as to whether or not any liability could accrue to the clerk of the Circuit Court of Jefferson County by reason of any wrongful act of said designated bailiff while acting as deputy clerk.

"The particular courts I have in mind are those engaged in the trial of criminal cases where it is possible (and has happened in the past) that the bailiff acting as deputy clerk may wrongfully commit

a person to jail, thereby creating liability to the Circuit Clerk for such wrongful act."

In answer to your inquiry, it is my opinion that the clerk of the circuit court would not be liable for any wrongful act of the bailiff-deputy clerk, which act was performed by the said bailiff-deputy clerk in his capacity as bailiff only.

The functions performed by the same party, as deputy clerk on the one hand and bailiff on the other, are separate and distinct. When he acts in the capacity of bailiff in committing persons to jail, such function has nothing whatsoever to do with his duties as deputy clerk. And vice versa, when he acts in the capacity of deputy clerk, he does not perform any function of the bailiff.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

February 28, 1947.

Hon. James F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Municipalities—Elections—Judge of Probate—Code of 1940,
Title 37, Section 36.

1. When a petition has been presented to the judge of probate under the provisions of Title 37, Section 36, Code of 1940, and said petition does not contain the requisite number of qualified electors, it is within the discretion of the judge of probate to surrender the same to the attorney for the petitioners upon his request therefor.

2. Upon the surrender of such petition by the judge of probate to the attorney for the petitioners, such petition may be circulated again in an effort to obtain the requisite number of qualified electors. When represented to the judge of probate, it is to be treated as an original petition.

3. A veteran of World War II who has not obtained a certificate of exemption from poll tax from the judge of probate is not a qualified elector and his name may not be considered as such on a petition filed under Sec. 36, supra.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 27, 1947, is as follows:

"On Friday of last week a petition under Section 36, of Chapter 4, Article 1, Title 37, of the Code of Alabama, was filed in the office of the Probate Judge of Barbour County, Alabama.

"The petition contained the names of 238 residents of the City of Eufaula. An examination of the list reveals that of this number 173 were qualified voters as contemplated in Section 36.

"As I construe Section 36, 189 qualified voters were necessary in order to authorize me to proceed as provided in the section of the code mentioned hereinabove. The figures were arrived at upon a basis of the 1940 federal census, as provided for in Section 36.

"Since the petition was filed, the attorney for the petitioners has inquired whether he might withdraw the petition. The attorney for the petitioners has also inquired whether or not he has the right to amend the petition. By amending is meant the filing of an additional document upon which, presumably, the remaining number of qualified voters would be added.

"I desire to proceed only in the way provided by law. I would like to ask the following questions:

"1. Under the facts stated, do I, as Probate Judge, have the right to surrender the petition to the attorney for the petitioners upon request of the said attorney to surrender it?

"2. Do the petitioners, or their attorney, have the right to amend the original petition by the addition of other or further names?

"3. In the event a World War II soldier, discharged, should sign his name to such a petition, should I count his name as a qualified voter in those cases where he has not claimed the exemption from payment of poll tax and done the other things required of him? The usual procedure is that such a soldier presents his honorable discharge, shows the Probate Judge that he has registered, and the Probate Judge then issues him his exemption certificate.

"In the event the soldier has not done these things, and his name is signed to such petition, am I warranted in considering his name in the same class with those who have unquestionably qualified to vote?

"In the event the amendment should include such number of names to warrant my action under Section 36 and the sections which

follow it, would I have the right to proceed just as though the petition originally contained the requisite number of voters?

"I will appreciate your opinion in this matter, since I am very anxious to proceed as the law directs."

Title 37, Section 36, Code of 1940, the statute under which the petition under consideration was filed, is in part as follows:

"§ 36. Petition for election.—Upon the presentation of a petition signed by a number of qualified electors of such city as will equal three voters for each one hundred inhabitants or fraction thereof, according to any federal or municipal census hereafter taken, residing in such city, to the judge of probate of the county in which such city is located or in which a part of such city is located, asking that the proposition of organizing under this article be submitted to the qualified voters of such city, the judge of probate shall examine such petition and determine whether or not the same is signed by the requisite number of qualified electors of such city to authorize such election in such city for the purpose of adopting the provisions of this article, and if such judge of probate shall find said petition contains a requisite number of electors to authorize such an election, he shall within fifteen days from the receipt of such petition certify such fact to the mayor of the city in which such election is so petitioned, and the certificate of the judge of probate as to the sufficiency of said petition shall be final * * *"

Under the provisions of Section 36, supra, when a petition is presented to you, it is your duty to examine the same and determine whether or not it is signed by the requisite number of qualified electors to authorize the election petitioned. If you find that such petition contains the requisite number of electors to authorize the election, you are required within fifteen days from receipt of the petition to certify such fact to the mayor of the city.

In view of the fact that Section 36, supra, does not impose any duty upon you if you find a petition presented thereunder does not contain the requisite number of electors to authorize the election, and is silent as to what should be done with the petition under such circumstances, it is my opinion that it is within your discretion to surrender the same to the attorney for the petitioners upon request by him therefor. See *March v. Board of Revenue and Road Commissioners of Mobile County*, 211 Ala. 468, 100 So. 822.

Answering your first inquiry, it is therefore my opinion that you have the right to surrender the petition under consideration to the attorney for the petitioners upon request of said attorney to surrender the same.

In answer to your second inquiry, it is my opinion that the petitioners or their attorney may, after the petition has been surrendered by you to

them, circulate the same again in an effort to obtain additional names of qualified electors, in order that the requisite number of qualified electors might be obtained. Upon representation of the petition to you, the petition should then be considered as an original petition. See *March v. Board of Revenue and Road Commissioners of Mobile County*, *supra*. In other words, it should be examined by you as required by said Section 36, and if you find that it contains the requisite number of qualified electors to authorize the election you should, within fifteen days after receipt of the same, certify the fact to the mayor of the city in which such election is petitioned.

It is my opinion that your third inquiry should be answered in the negative.

Before a veteran may become a qualified elector, he must not only register as required by law, but he must also obtain a certificate of exemption from poll tax from the judge of probate. He is not a qualified elector until such certificate of exemption is obtained from the judge of probate. His name could not be placed on the official list of qualified electors until such certificate of exemption from poll tax has been obtained from the judge of probate. *Quarterly Report of the Attorney General*, Volume 42, page 59.

Your last inquiry was answered in my answer to your second inquiry.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 3, 1947.

Hon. J. Ed Keith, Member,
Jury Board of Jefferson County,
Birmingham, Alabama.

Jefferson County—Local Acts 1932, Extra Session, pages
98-101—

Code 1940, Title 30, Section 21, as amended by Act No. 325,
H. 231, approved July 1, 1943—

Jury and Jurors—

Persons over the age of sixty-five years in Jefferson County
are ineligible on account of age to serve as jurors.

Persons who are exempt from jury duty under the provisions of General Acts of Alabama 1943, page 197, should not be placed on the jury roll and in the jury box of Jefferson County.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of February 4, 1947, is as follows:

"In a letter dated September 13, 1943, the Alabama Attorney General stated to Mr. Hugh W. Brown, the then President of the Jefferson County Jury Board, that, it was his (the Attorney General's) opinion that persons over the age of sixty-five years are not legally disqualified on account of their age to be jurors in Jefferson County, Alabama. (Vol. 32, Quarterly Report, p. 117.)

"Pursuant to that opinion, the Jefferson County Jury Board in making up the jury roll, cards for jurors, and in refilling the box, has heretofore been treating persons over the age of 65 years as not being disqualified on account of their age. However, the Jury Board understands that there has developed a considerable weight of opinion in legal circles in this county that a person over the age of 65 years is not qualified to be a juror in Jefferson County.

"By reason of this development, and by reason of the further fact that the Attorney General's opinion of September 13, 1943, revealed sentiments of doubt as to the conclusions reached in that opinion, I feel constrained to kindly request that you reconsider the views expressed in that opinion, and upon such reconsideration, give me your opinion on the question dealt with in that opinion, which question is:

"Is a person over the age of 65 years disqualified to be a juror in Jefferson County by reason of his age?

"I would also appreciate your advising me upon this further and additional question:

"Should the name of persons who are exempt from jury duty under the provisions of General Acts of Alabama of 1943, p. 197, but who are otherwise qualified to be jurors in Jefferson County, be placed on the jury roll in Jefferson County?"

The law under which your Board exists and functions is an Act of the Legislature establishing a Jury Board in Jefferson County, approved November 9, 1932 (Local Acts of 1932, pp. 98-104).

Section 14 of this Act prescribes the qualifications of persons whose names are to be placed on the jury roll and in the jury box, the qualifications specified being as follows:

1. The person must be a male citizen of Jefferson County.
2. The person must be generally reputed to be honest and intelligent.
3. The person must be esteemed in the community for his integrity, good character and sound judgment.
4. The person must not be under 21 or over 65 years of age.
5. The person must not be an habitual drunkard.
6. The person must not be afflicted with a permanent disease or physical weakness of such character as to make him unfit to discharge the duties of a juror.
7. The person must be able to read the English language, except that if he is a householder or freeholder, his inability to read the English language does not disqualify him.
8. The person must never have been convicted of any offense involving moral turpitude.

Section 12 of the Act above referred to specifies that at certain times (the last Tuesday in August in odd numbered years, beginning with the year 1933) the Jury Board shall make a roll containing the name of every male citizen living in the county who possesses the qualifications prescribed in the Act (which qualifications are set forth above), and who is not exempted by law from serving on juries; and further provides for the making of cards from the roll and placing the cards in the box. Section 15 of the Act provides that "The Jury Board is charged with the duty of seeing that the name of every person possessing the qualifications prescribed by this Act to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box . . ."

The Act above referred to makes no particularization as to what persons are exempt from serving on juries, or are exempt from jury duty. But it is clear, in my opinion, that the terms "exempted by law from serving on juries" (as used in section 12), and "exempted by law from jury duty" (as used in Section 15), means persons who by the general laws of the state are exempt from jury duty at the time that the roll and cards are to be made and the box filled. Under the general laws of this State as they now exist (General Acts of 1943, p. 197) the following persons are exempt from serving on juries or from jury duty:

1. Judges of the several courts.
2. Attorneys at law during the time they practice their profession.

3. Officers of the United States.
4. Officers of the executive department of the state government.
5. Sheriffs and their deputies.
6. Clerks of the courts and county commissioners.
7. Regularly licensed and practicing physicians.
8. Dentists.
9. Pharmacists.
10. Optometrists.
11. Teachers while actually engaged in teaching.
12. Actuaries while actually engaged in their profession.
13. Officers and regularly licensed engineers of any boat plying the waters of this State.
14. Passenger bus driver-operators, and driver-operators of motor vehicles hauling freight for hire under the supervision of the Alabama Public Service Commission.
15. Railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office.
16. Newspaper reporters while engaged in the discharge of their duties as such.
17. Regularly licensed embalmers while actually engaged in their profession.
18. Radio broadcasting engineers and announcers when engaged in the regular performance of their duties.
19. The superintendents, physicians, and all regular employees of the Bryce Hospital in Tuscaloosa County and the Searcey Hospital in Mobile County.
20. Officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service.
21. Convict and prison guards while engaged in the discharge of their duties as such.

I think it clear that under the law as it now exists the Jury Board of Jefferson County is under the duty not to place on the jury roll, nor in the jury box, of Jefferson County, the name of any person who is disqualified under Section 14 of the Act of November 9, 1932 (the provisions of which respecting qualifications have been set forth above) or who is exempt from jury duty under General Acts of 1943, p. 197 (which exemptions are set forth above). Cf. *Quarterly Report of Attorney General*, Vol. 20, p. 356.

I have carefully considered the opinion of the Attorney General dated September 7, 1943 (Vol. 32, *Quarterly Report*, Attorney General, p. 117), and addressed to Hon. Hugh Brown, the then President, Jefferson County Jury Board, which holds that persons over the age of sixty-five years are not disqualified, by reasons of such age, to serve as jurors in Jefferson County. There can be no objection whatever to persons over sixty-five years of age serving on juries in Jefferson County at their election. In fact many of the finest persons who could be found to serve as jurors are over the age of sixty-five years. However, the matter of the legal qualification of persons over the age of sixty-five years, no doubt, will be brought into question by litigants in Jefferson County in view of the former opinion of this office.

The general laws of the state relating to the matter of Jury Commissions, their methods and procedures, and the qualifications of jurors, were completely rewritten by an Act of the Legislature, approved March 2, 1939 (General Acts of 1939, p. 86). Section 25 of said Act specifically states that nothing in that Act "shall be construed as repealing, modifying, extending or limiting in any way" certain specified local acts, among those specified being "The Act of the Legislature appearing in Local Acts of Special Session of 1932, at pages 98, et seq." The Act appearing in the Local Acts of Special Session of 1932 at pages 98, et seq., is the local Act of Jefferson County. In the Act approved March 2, 1939, was a specification of the qualifications of persons to be jurors (Section 14 of said Act). Said Section 14 was brought forward into the 1940 Code of Alabama as Section 21 of Title 30. By an Act of the Legislature approved July 1, 1943 (General Acts of 1943, p. 309), Section 21 of Title 30 was amended so as to eliminate as a ground of disqualification the fact that a person was over sixty-five years of age, and to provide that a person over sixty-five years of age might refuse to serve as a juror. Since the Act approved March 2, 1939 (from which Section 21 of Title 30 of the Code of 1940 was derived) specifically provided that nothing in that Act should be construed as repealing, modifying, extending or limiting in any way, the Act appearing in the Local Acts of 1932 at pages 98, et seq. (the Jefferson County Local Act), and since there is nothing whatever in the Act of July 1943, amending Section 21 of Title 30 indicating that it was intended to repeal or modify or limit in any way provisions of the Jefferson County Local Act, I do not think the Act of July 1, 1943 can be properly interpreted as repealing or modifying or limiting in any way the provisions of the Jefferson County Local Act pertaining to the qualifications of a person to be a juror in Jefferson County.

In reference to the question of whether a general law repeals a local law, I agree with the former opinion that "where the clear general intent of the Legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed." However, I am definitely of the opinion that there is no manifestation of an intent, clear and general, or otherwise, in the Legislature to establish a uniform system throughout the state by the amendment of Section 21 of Title 30. That section was but a fragment of a system generally applicable over the state, but having no application in Jefferson County. (Local Acts of 1932, p. 98, et seq., plus Section 25 of the Act of March 2, 1939, from which the general state system was derived, plus Section 9 of Title 1 of the Code of 1940, plus Section 1, Title 62, Code 1940). I do not think that the amendment of a fragment of a general system, which general system had no application in Jefferson County, can be properly interpreted as repealing a local law for Jefferson County. In the former opinion the Attorney General candidly revealed his own feeling of uncertainty upon the question when he said, "The question is not without difficulty. It possibly might be answered either way and plausible reasons and citation of authorities made in support of whichever view was advanced." However, I am of the opinion that he overlooked Section 25 of the Act of March 2, 1939 (General Acts 1939, p. 86). Section 25 of the Act of March 2, 1939, *supra*, is the saving clause, evidencing the intent of the Legislature not to disturb the jury law applicable to Jefferson County.

Repeal by implication is never favored and this is sepecially true as respects a general law in conflict with a local law even though the local law is general in form.

It necessarily follows that the opinion of this office under date of September 7, 1943, addressed to Hon. Hugh W. Brown, President of the Jefferson County Jury Board (Quarterly Report, Attorney General, Volume 32, page 117), is overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 5, 1947.

Hon. Frank Grigg, Clerk,
Circuit Court,
Jackson County,
Scottsboro, Alabama.

Act No. 647, Local Acts 1939—Solicitor's fees—

1. Under Act No. 647, Local Acts 1939, which act created the Jackson County Court, there are no provisions for solicitors' fees.

2. There being no provisions for solicitors' fees in the act creating the Jackson County Court, the Clerk of Jackson County Court cannot assess a solicitors' fee against a defendant when said defendant is convicted.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1947, is as follows:

"Will you please give me an opinion on the question as to whether or not an attorney representing a city is allowed a fee from the defendant on cases appealed to a higher court, namely, county court.

"The City of Scottsboro, Bridgeport, and Stevenson retains an Attorney whose duty it is to, among other things, prosecute criminal cases in the Jackson County Court when the Defendant appeals the verdict of the city Recorder's Court. In the trial of such appeal cases, the City Attorney acts as the Solicitor. In cases tried in the Jackson County Court in which a verdict of guilty is rendered, the City has requested that the fee allowed and charged as a Solicitor's fee for such cases be charged against the Defendant and when collected, that it be remitted to the City from which the case was appealed.

"Please advise me whether or not I, as Clerk of the Jackson County Court, may charge and collect such fees and dispose of them in the manner requested."

My answer is in the negative .

The Local Act creating the Jackson County Court (Act No. 647, Local Acts 1939, page 368) in Section 6 thereof provides as follows:

"That the deputy solicitor appointed or elected for Jackson County Circuit Court shall represent the State in all criminal cases in said Court, as ex officio solicitor of the Jackson County Court and shall receive a salary of \$1500.00 per annum, payable in equal monthly installments out of the county treasury at the end of each month, his signed receipt being required, and said salary and compensation shall be in lieu of all other salary or compensation now provided by law for said deputy solicitor for said county."

A close perusal of Act No. 647, supra, creating the Jackson County Court fails to reveal any express provisions for solicitors' fees at all. No reference is made to the applicability of solicitors' fees under general law (Title 11, Section 87, Code of Alabama 1940), nor are any solicitors' fees enumerated in the Local Act itself.

The law of costs and fees is held to be penal in nature and no fee can be demanded which is not expressly authorized by law. See Title 11, Sections 1 and 79, Code of Alabama 1940.

An officer claiming fees must point out definite law authorizing them and such law cannot be extended beyond its letter as the State may impose duties on public officers without providing compensation therefor.

Mobile County v. Williams, 180 Ala. 639, 61 So. 963;

Jefferson County v. Capanes, 235 Ala. 449, 179 So. 637;

Reports of Attorney General, July-Sept. 1939, page 71;

Reports of Attorney General, 1936-38, page 656;

Copeland v. Jefferson County, 192 Ala. 12, 68 So. 285, and cases cited.

Act No. 647, supra, being completely silent as to solicitors' fees, it is, therefore, my opinion that no such fee can here attach. You are, therefore, advised that you, as Clerk of the Jackson County Court may not assess such fees hereinabove discussed.

For an analogous opinion see Quarterly Reports of Attorney General, Volume 25, page 168.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 5, 1947.

Hon. Warren Mitchell,
Service Commissioner,
Autauga County,
Prattville, Alabama.

Officers—Juries—Service Commissioners

One may not hold office of County Service Commissioner and Jury Commissioner at one and the same time, as such is prohibited by Section 9 of Title 30, Code of 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 11, 1947, is as follows:

"Please refer to Title 30, Paragraph 9, Code of Alabama 1940, which reads in part as follows:

"Members of the Commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever."

"Recently I received an appointment as a commissioner, for Autauga County, Alabama.

"Before the appointment and at the time, I am the County Service Commissioner for Autauga County, Alabama.

"With reference to the above paragraph 9 of Section 30, of the Code of 1940, am I qualified to act as a Jury Commissioner?

"Please give your opinion as soon as possible."

I am of the opinion your inquiry should be answered in the negative.

The disqualification set out in Section 9 of Title 30 of the Code of 1940, quoted in your letter of inquiry, is broad and all inclusive. A county service commissioner is appointed under Section 6 of Act #173, H. 113, approved June 23, 1945 (Gen. Acts 1945, p. 304), and his compensation is provided for in Section 7 of said act. He clearly comes within the inhibition of Section 9 of Title 30, *supra*.—**Quarterly Report of Attorney General**, Vol. 22, page 123; **Biennial Report of Attorney General**, 1934-36, page 323.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 6, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Accounts,
Capitol.

Offices and Officers—Title 41, Section 132, Code of Alabama
1940.

Funds originally paid under protest do not lose their identity as "protest funds" when delivered by an outgoing officer to his qualified successor.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, dated February 25, 1947, is as follows:

"Under General Acts 1945 Regular Session page 754-760 a tax of two cents on each fluid ounce or fractional part thereof of malt or brewed beverages, sold or delivered, stored or taken out of storage within such Counties and provided for such payment of tax to the License Commissioner. In *Donaghue, et al vs. Bunkley, Commissioner of Licenses, et al*, 1 Div. 245 decided February 28, 1946, it was held that the above mentioned beer tax was unconstitutional.

"The Commissioner of Licenses had collected \$153,550.07 of such tax, and under date of March 12, 1946, the Attorney General held that refunds might be made to the so-called taxpayers of the respective amounts by them under protest.

"There is a balance of \$6,407.14. Said balance is deposited to the credit of 'Frank Bunkley, License Commissioner, Special Account Beer Tax Collection.'

"My question to you is if Mr. Bunkley, the License Commissioner, should not turn over to his successor the above balance for payment when proper claim is made upon the present License Commissioner of Mobile County for reimbursement of said tax paid under protest."

It is axiomatic that an outgoing officer must turn over to his qualified successor all money, etc., belonging to or pertaining to such office. Title 41, Section 132, Code 1940.

There can be no valid objection to the action of Mr. Bunkley in turning over the balance of funds in his possession derived from the collection of the beer tax, which tax was subsequently declared unconstitutional (247 Ala. 423, 25 So. 2d. 61), to his qualified successor, under protest. However, no good purpose can be subserved in this method of

delivery. If he should turn over the funds without protest this fact would not change the identity of the funds as "protest funds." These funds were originally paid "under protest" and will retain their identity as "protest funds" in the hands of any and all persons.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 6, 1947.

Hon. Frank Boswell, Director,
Department of Corrections & Institutions,
Capitol.

Convicts—Burial—Claims—

State may not reimburse superintendent of convict camp for express charges paid by him for transporting body of deceased convict to place of burial.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated February 20, 1947, is as follows:

"We have a case at one of our road camps on which we ask that you please give us a ruling. We had an inmate to die at our Camp Thomaston and the Superintendent paid the express charges on his body to Sheffield, Alabama, amounting to \$15.45. We would like to know if the State should reimburse the camp Superintendent for these charges."

It is my opinion that your inquiry should be answered in the negative.

I know of no authority of law whereby the State may reimburse the Superintendent for the expenditure under consideration. Evidently the body of the deceased convict was sent from Camp Thomaston to Sheffield, Alabama, at the request of his relatives or friends, who would be responsible for the express charges in question. Otherwise, as I am informed by a representative of your department, the convict would have been buried at Camp Thomaston by the State.

Section 352 of Title 15, Code of 1940, provides only for the payment by the State of the charges of transporting the body of a legally electrocuted convict back to his home where his family or friends cannot pay such expenses. This section has no application in the instant case.—Cf. Biennial Report of Attorney General, 1926-28, page 247.

Sections 15, 16 and 17 of Title 44, Code of 1940, are applicable only to the burial of paupers by counties or municipalities. These sections likewise have no application to the case at hand.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 6, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile, Alabama.

Licenses—No license required of person engaged in the business of operating a radio repair service.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 19, 1947, is as follows:

"A matter came up this morning relative to a license for the repairing of radios. I cannot make heads or tails of it in the code. I do know, however, that there is a license for the selling of radios but I have been unable to find any license to cover operating a radio repair shop. I would appreciate it very much if you would let me have this information as early as possible for the reason that the License Inspector of Mobile County, namely, Mr. Tom Holley, has asked my office for an opinion on this and as stated before I am unable to do so."

I find no license schedule in the Code covering the operation of a radio repair shop.

Some of our State license inspectors have erroneously insisted from time to time that such operation should come within the purview of Title 51, Section 511, Code of Alabama 1940, which levies a license:

“For each dealer in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, or for each electrical or gas repair, or electrical or gas supply shop; * * *”

However, this office construes this section as applicable only to electric or gas refrigerators, heaters, water heaters, and stoves, or in other words to those devices only that are mentioned in the statute.

See Biennial Report of Attorney General 1936-38, p. 596.

You are, therefore, advised that there is no license imposed under our general revenue law for the operation of a radio repair shop.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 6, 1947.

Hon. I. G. Hendon, Superintendent,
County Board of Education,
Randolph County,
Wedowee, Alabama.

Title 52, Section 68, Code 1940—

Mileage—Board of Education Member—

1. Board of Education of Randolph County cannot pay mileage to Board member for purpose of attending board meetings when said board member seeks mileage to and from place of temporary residence without the county.

2. Mileage allowance provided for board members of county boards of education in attending meetings is restricted to mileage to and from board member's legal residence in county or election district from which he was elected or appointed.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 20, 1947, is as follows:

"A member recently elected to the Randolph County Board of Education has removed to Tuscaloosa, Alabama, where he expects to live for the next two years. He was present today for his first official attendance.

"We understand he can live wherever he chooses so long as he does not take up residence in another state.

"This question:

"Can and should the Randolph County Board of Education allow and pay this member regular mileage to and from the meetings of the Randolph County Board of Education? The round trip will approximate 350 miles.

"The only question we are interested in, or rather were interested in, is whether or not we can legally pay mileage to and from Wedowee from the University of Alabama. Although Mr. Haynes does live, and will live for the next two years, at the University, we consider his residence to be in Randolph County for any and all legal purposes. The people elected him and we wish to be allowed his services. Therefore, if consistent with the law and your policies, we would appreciate a ruling which would authorize this service."

In the introductory portion of your request for an official opinion, facts are set out indicating that the Board of Education member referred to, "removed to Tuscaloosa, Alabama, where he expects to live for the next two years." Further comment is made that it is understood that "he can live wherever he chooses so long as he does not take up residence in another state."

For purposes of clarification, it is brought to your attention that the latter statement is incorrect.

From Title 41, Section 160, Code of Alabama 1940, the following is quoted in pertinent part:

"Any office of this state is vacated: * * * By ceasing to be a resident of the State, or of the division, district, circuit or county for which he was elected or appointed." (Emphasis supplied.)

In an interpretation of this statute the Supreme Court of Alabama, in the case of *Baker v. Conway*, 214 Ala. 356, 108 So. 18, clearly indicates that mere removal to another county would constitute a vacancy under the meaning of this statute.

However, in the instant case, you further comment on the fact that the board member under consideration lives at the University of Alabama. (It is understood that he is a student at that institution.) The above situation is thus altered by Title 17, Section 17, Code of Alabama 1940, which reads:

“§ 17. Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States, neither shall any soldier, sailor, or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.” (Emphasis supplied.)

It, therefore, appears that the board member referred to would retain his legal residence in Randolph County under Section 17, *supra*.

With this point clarified I come to the question of mileage allowance to and from the University of Alabama for the purpose of attending board meetings in Randolph County.

Your attention is directed to Title 52, Section 68, Code of Alabama 1940, which reads:

“§ 68. Compensation.—The members of the county board of education shall receive from the public school funds of the county five dollars a day and their actual traveling and hotel expenses incurred in attendings meetings of the board, and transacting the business of the board. The members of the county board shall not be allowed pay for more than twelve days in any one year, and their expenses shall be paid in like manner as provided for the compensation of teachers. They shall not be required to hold teachers' certificates.”

You will note that authority is contained in the above statute to pay members of the County Board of Education for their actual traveling and hotel expenses incurred in attending meetings of the board. However, I find no cases, legal basis, or legal analogy, to draw upon which would allow members of a county board of education, without the county and not on official business, to be paid mileage allowance from a point of temporary residence. The law of costs and fees, which would include mileage allowances here under consideration, is strictly construed and payments cannot be extended beyond the letter of the law setting forth the authority to pay.

Copeland v. Jefferson County, 192 Ala. 12, 68 So. 285;

Jefferson County v. Capanes, 235 Ala. 449, 179 So. 637.

In the absence of legal rulings applicable to the current situation, it is my opinion that the statute here, under consideration is providing for mileage compensation, contemplates actual travel expense only for the round trip from the point of the said board member's legal residence within the county or election district from which he was elected to the place where the board meeting is held. You are, therefore, advised accordingly.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 6, 1947.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Vocational Education—County Board of Education—Appropriation—Title 52, Sections 385 and 388, Code of 1940.

1. County authorized to appropriate funds for the purpose of paying freight transportation charges on machinery allotted for use in one of the high schools of the county in furtherance of vocational education.

2. Such appropriation should be made to the County Board of Education and County Board of Education should in turn pay such transportation charges.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 21, 1947, is as follows:

"The War Assets Corporation has allotted certain machinery to one of the High Schools in Elmore County to be used for vocational purposes. The County has been requested to pay the transportation charges on this machinery. We would appreciate your opinion as to whether we can legally pay such charges and if so, must we pay

through the Board of Education, or can we pay it direct. The parties involved are anxious to have this ruling by next Tuesday if possible.

Your immediate attention will be greatly appreciated."

Your inquiry poses two questions: (1) May the governing body of your county appropriate sufficient funds to pay the transportation charges on certain machinery which has been allocated by the War Assets Corporation to the county for use in one of the high schools located within the county to be used in furtherance of vocational education, and (2) if this appropriation is legal, should the county pay the charges direct or should the appropriation be made to the County Board of Education for it in turn to pay said charges?

The two pertinent code sections relating to the answers of said questions are Section 385 and 388, Title 52, Code of Alabama 1940. These code sections read respectively:

"§ 385. City and county boards to co-operate with state board.—The board of education of any county or of any city having a city board of education, may co-operate with the state board of education in the establishment of vocational schools or classes giving instructions in agricultural subjects, in trade or industrial subjects or in home economics subjects and may use any moneys raised by public taxation in the same manner as moneys for other school purposes are used, for the maintenance and support of public schools."

"§ 388. County and city may make appropriation for Smith-Hughes type of vocational training.—Boards of revenue and courts of county commissioners of counties of Alabama are hereby authorized to make appropriations to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established; provided that such appropriations may only be made for use in any school or schools duly recognized by the state board of education as centers for vocational instruction of the Smith-Hughes type, and on account of which reimbursement is being made or is to be made during the next fiscal school year following the first payment of county funds appropriated for such purposes."

It appears from Section 385, *supra*, that county boards of education may cooperate with the State Board of Education in establishing vocational schools or classes giving instructions in agricultural subjects, in trade or industrial subjects, or in home economics subjects and for their purpose may use any monies raised by public taxation in the same manner as monies for other school purposes are used.

It appears from Section 388, *supra*, that boards of revenue or other governing bodies of the several counties of the State are authorized to appropriate public funds to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established. The only limitation on county governing bodies in this regard is that the money so appropriated to the county boards of education for this purpose must be used in schools recognized by the State Board of Education as centers for vocational instruction of the Smith-Hughes type.

There is direct authority contained in Section 388, *supra*, for counties to appropriate money to county boards of education for the purpose of maintaining vocational departments after they have been established.

If your county governing body had seen fit to appropriate funds to purchase this machinery outright for use in the furtherance of vocational education in your county, the authority so to do is contained in Section 388. Certain it is that if your governing body could appropriate funds to purchase this machinery in the first instance, it has authority to appropriate funds to pay the transportation charges on such machinery when it is allotted free gratis by the War Assets Corporation for use in one of the high schools of the county in furtherance of vocational education.

My answer, therefore, to your first question is in the affirmative.

My answer to your second question is that the governing body of your county should make this appropriation to the county board of education and the county board of education in turn should pay the transportation charges on the machinery here considered.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 6, 1947.

Hon. Turpin C. Bannister, Chairman,
Board for Registration of Architects,
229 Woodfield Drive,
Auburn, Alabama.
Architects—Engineers.

A firm composed of only one registered architect and one registered engineer may not legally use in the firm name the plural terms "Architects" and "Engineers," as such would be

violative of Section 9 of Title 46, Code of 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 4, 1947, is as follows:

"The Alabama State Board for Registration of Architects has directed me as Chairman to request your opinion as to whether a firm composed of two members, one of which is a registered architect and the other a registered engineer, can legally use in the firm name the plural terms 'Architects' and 'Engineers'.

"The question is raised because the use of the plural of these terms could be taken to indicate that both members of the firm are registered architects and registered engineers."

I am of the opinion that your inquiry should be answered in the negative.

Section 9 of Title 46, Code of 1940, as amended by Acts of 1943, page 191, provides in pertinent part as follows:

"§ 9. When chapter does not apply.— * * * * * However, no professional engineer shall practice architecture or use the designation 'Architect' or any term derived therefrom unless registered under this chapter, and no architect shall practice professional engineering or use the term 'Engineer' or any term derived therefrom unless he is also qualified and registered as such engineer. * * * * *"

The purpose of the above provision is to prevent a professional engineer from using the designation "Architect" if not registered as such, and also to prevent an architect from using the term "Engineer" if not registered as an engineer. The designation of "Architects" and "Engineers" in a firm name would indicate that the firm consisted of more than one registered architect and more than one registered engineer. Therefore, it is my opinion that a firm composed of only one registered architect and one registered engineer may not legally use the plural terms "Architects" and "Engineers" in its firm name.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 7, 1947.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Midwives—County Boards of Health—Health—Title 46, Section 168, Title 22, Section 8, Subsection 1, Code of Alabama 1940.

County boards of health neither under rule making power nor power to issue permits have authority to set fee to be charged by midwives for reason that permit statute does not so provide and fee fixing is not necessary for administering health laws.

Opinion by Assistant Attorney General Sykes.

Dear Dr. Gill:

. Your request for an official opinion, bearing date of February 11, 1947, is as follows:

"Section 168 of Title 46 of the 1940 Code of Alabama makes it a responsibility of the County Board of Health to pass upon the qualifications of a midwife to practice in the state. Sub-section 1 of Section 8 of Title 22 authorizes the County Board of Health to adopt rules and regulations for administering the health laws of the state. Do these provisions carry the right on the part of the County Board of Health to fix the fee a midwife may charge for her services?"

In my judgment, the statutes referred to in your inquiry (Title 46, Section 168, Title 22, Section 8, Sub-section 1, Code of Alabama 1940) do not authorize the county board of health to fix the fee a midwife may charge for her services.

Title 46, Section 168, provides as follows:

"§ 168. Practice of midwifery regulated—It shall be unlawful, for any person, other than a regularly licensed physician, to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health. The term 'midwife' shall be construed to include any person, other than a regularly licensed physician, who shall attend, or who shall bargain, contract, or agree to attend, any woman at or during childbirth. Any person violating this section shall be guilty of a misdemeanor, and upon conviction, upon the first offense, shall be fined not less than ten dollars or imprisonment for not less than one month, and for subsequent offenses shall be fined not less than

fifty dollars, nor more than five hundred dollars, or imprisoned for not less than three months nor more than six months, or both. County boards of health shall from time to time, upon written application made in such form and in such manner as may be prescribed by the state board of health, either by a schedule of questions to be answered and subscribed, or orally, examine any person of a good moral character and temperate habits who desires to engage in the practice of midwifery, as to his or her qualifications and knowledge of the art; and if a majority of the county board of health shall be satisfied that such person is competent to engage in the practice of midwifery, said board shall enter the name of such person as a registered midwife in a book provided for that purpose, and may at its discretion issue to such person a permit to practice midwifery to be signed by the chairman of said board, and countersigned by the health officer. No permit to practice midwifery shall be issued by a county board of health to any person, unless such person shall present to said county board of health satisfactory evidence of having or possessing sufficient knowledge and skill in the art of midwifery, and that such person is free from a communicable disease, and of good moral character. The said permit may be revoked by the county board of health at any time, after proper investigation because of failure to comply with the provisions of this chapter, or the rules and regulations of the state board of health applying to midwifery."

As you will note, this section requires a person, before practicing midwifery, to obtain a permit from the county board of health. The county board of health, in granting the permit, passes upon the qualifications of the applicant and her fitness to perform the duties of midwifery. Neither expressly nor impliedly do the provisions of this statute authorize the county board of health to fix the fee a midwife may charge for her services.

In construing Title 46, Section 168, *supra*, this office held that the county board of health was without authority to assess and collect a fee for issuing a permit to a midwife. Biennial Report of Attorney General, 1936-1938, p. 559. This for the reason that Title 46, Section 168, does not provide for a fee. In this matter, the statute was given a strict interpretation. As stated before, this section, Section 168, does not expressly or impliedly authorize the county board of health to fix fees to be received by midwives for their services.

Title 22, Section 8, Subsection 1, referred to in your inquiry, provides in part as follows:

"It shall be the duty of the county boards of health in their respective counties and subject to the supervision and control of the state board of health: (1) to supervise the enforcement of the health laws of the state, including all ordinances or rules and regulations of municipalities or of county boards of health, or of the state board

of health; * * * and to adopt and promulgate, if necessary, rules and regulations for administering the health laws of the state and the rules and regulations of the state board of health, which rules and regulations of the county boards of health shall have the force and effect of law, and shall be executed and enforced by the same bodies, officials, agents, and employees as in the case of health laws."

A rule and regulation promulgated by the county board of health under the authority of this sub-section must be necessary for administering the health laws of the State. Therefore, any rule or regulation promulgated by the county board must have some connection with, or be ancillary to, some health law.

In my judgment, a rule or regulation of the county board of health fixing a fee to be charged by a midwife for the performance of her duties is not necessary for the enforcement or for the administration of Title 46, Section 168. This section merely requires that the county board of health determine whether or not the applicant is qualified to perform such services.

The right of a person to receive compensation for personal services is a right guaranteed by the Constitution, both State and Federal.

In businesses and professions affected with a public interest, the Legislature is authorized under its police power to fix the rates to be charged for such services. The Legislature may also delegate to boards and commissions the power to fix charges and rates. See **Franklin v. State, ex rel. Alabama Milk Control Board**, 232 Ala. 637, 169 So. 295.

It has also been held that the Legislature may delegate to boards and commissions the power to make rules when the standards have been fixed by the Legislature. **State v. Friedkin**, 14 So. 2d. 363. But the board or commission empowered to make rules and regulations must act within the standards declared by the Legislature. The board must not legislate in any respect. **State v. Friedkin**, supra.

You are advised, therefore, that since the Legislature has neither expressly nor impliedly conferred upon the county board of health the authority to fix fees to be received by midwives for their services, a rule or regulation attempting to set such fees would be invalid. See **City of Mobile v. Rouse**, 233 Alabama 622, 173 So. 266.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 7, 1947.

Hon. B. C. Davis, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alcoholic Beverage Control Board—Official year—Title 29, Code of Alabama 1940; Act No. 255, General Acts 1943, page 226, approved June 24, 1943.

Calendar year is the official year for operations of the Alcoholic Beverage Control Board, including the payment of per diem to members of the Board.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of February 19, 1947, is as follows:

“Section 3 of Chapter 1, Title 29, the 1940 Code of Alabama, provides for the appointment of members of the Alabama Alcoholic Beverage Control Board. The term of office is specified in this paragraph and further provision is made for the appointment of a successor for an unexpired term.

“An opinion by Assistant Attorney General Simmons, dated January 3, 1938, and addressed to Hon. D. E. Dunn, Administrator, Alabama Alcoholic Beverage Control Board, specifies that each member of the Board, whether he be an initial appointee or a successor, should have pay for his official services rendered but not exceeding individually the maximum of \$1200 prescribed for any official year.

“Original appointments of Board members were made as of the effective date of the Beverage Control Act; to wit, February 11, 1937. The fiscal year of the Alabama ABC Board is the same as the calendar year; to wit, January 1 through December 31. The fiscal year of the State runs from October 1 through September 30 of the following year.

“We desire an interpretation of the official year for the purpose of payment of per diem to members of the Alabama Alcoholic Beverage Control Board.”

The statutory law of this state governing the operations of the Alcoholic Beverage Control Board is found in Title 29, Code of Alabama 1940, and certain subsequently enacted statutes of which the only one here pertinent is Act No. 255, General Acts 1943, page 226, approved June 24, 1943.

Title 29, Section 4, provides that the Board "during the month of January of each year" shall make a report to the Governor concerning its administration.

Title 29, Section 10, provides for the distribution of net profits derived from the proceeds of the Alabama liquor stores "in each calendar year" up to and including two million dollars in the manner therein outlined.

Title 29, Section 11, provides for the distribution of the net profits derived from the proceeds of the Alabama liquor stores "in any such calendar year" in excess of two million dollars in the manner therein outlined.

Title 29, Section 19, provides that licenses shall become due and payable "on or before January first of each year, for the ensuing year."

Title 29, Section 25, provides that licenses by the Board shall, unless sooner revoked, be valid for the license year which, in the case of retailers, shall begin "on the first day of January of each year" and, in the case of distributors and wholesalers, shall be "for such license year as may be established by the board."

It further provides that licenses issued to manufacturers and public service companies shall, unless sooner revoked, be valid "for the calendar year for which they are issued" and that such licenses may be issued at any time "during the calendar year."

Act No. 255, General Acts 1943, page 226, approved June 24, 1943, provides for the distribution, in the manner therein provided of the net profits derived from the proceeds of the Alabama liquor stores "in each calendar year." (This act, in effect, supersedes Title 29, Sections 10 and 11, *supra*.)

All of these provisions evince a clear intention on the part of the Legislature that the official year for operations of the Alcoholic Beverage Control Board should be the calendar year rather than the fiscal year (Oct. 1 to Sept. 30, inclusive).

Title 29, Section 3, provides that the members of the Alcoholic Beverage Control Board shall receive their actual expenses while engaged in the performance of their duties, and a per diem of ten dollars per day, but not exceeding twelve hundred dollars "per annum."

Inasmuch as the official year for operations of the Alcoholic Beverage Control Board is the calendar year rather than the fiscal year, I am of the opinion that this "per annum" limitation on the per diem which members of the Board may draw, refers to the calendar year rather than the fiscal year. Indeed, the per diem allowance to members of the Board is an accounting factor in the determination of net profits which, as pointed out above, are distributed on a calendar year basis.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 7, 1947.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Act No. 353, General Acts of 1945, page 570, approved July 6, 1945—

Veterans—License exemptions—

Two veterans engaging in business together, each individually meeting the requirements for exemption under Act No. 353, General Acts of 1945, page 570, approved July 6, 1945, are entitled to exemption from municipal license under the conditions of said act.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 1, 1947, is as follows:

"Please give me ruling in regards License exemption under Municipalities for veterans. For example, if two veterans should engage in business together each meeting the required exemption of less than five thousand dollars property ownership, and twenty-five hundred dollars net income, would they be entitled to exemptions under municipalities as in State and County."

My answer is in the affirmative. The question you raise calls for an interpretation of Act No. 353, General Acts of 1945, page 570, approved July 6, 1945.

Pertinent portions of this act are herewith quoted as follows:

"Section 1. Every bona fide permanent resident of the State of Alabama who has served 60 days or more in the armed forces of the United States between September 16, 1940, and the termination of the existing war by the signing of a definitive treaty of peace shall, upon sufficient identification, upon sufficient proof of being a permanent resident of this State, and upon the production of an honorable discharge from or other proof of the honorable termination of service including such service in the armed forces, be exempt from business or occupational license taxes for a period of 3 years after the effective date of this act or for a period of 3 years after his discharge from or termination of service including such service, whichever is the later, to the extent and subject to the conditions herein specified. No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle."

"Section 4. Each such veteran who shall engage in or carry on any businesses or occupation for which license taxes are prescribed by any municipality in Alabama shall be entitled to licenses from the municipality to engage in or carry on those businesses or occupations upon the payment of the license taxes prescribed, less, as regards each veteran, such portion of the license taxes as shall not exceed \$35.00. However, no such veteran may claim the exemption in more than one municipality."

"Section 6. No exemption under the provisions of this act shall be allowed any corporation or association. As to partnerships, the exemption shall be allowed a partnership only when each partner thereof individually would be entitled to an exemption hereunder. However, an individual entitled to an exemption shall not be denied it by reason of being a member of a partnership in those cases when the licenses are required of the individual members of a partnership and not of the partnership as such. Any such veteran whose property, both real and personal, is valued at \$5,000.00 or more or whose net annual income is \$2,500.00 or more shall not be granted the exemptions provided for herein." (Emphasis supplied.)

It can be seen from the last section above quoted that exemption from license payment is allowed a partnership when each partner individually meets the requirements for exemption. Furthermore, an individual entitled to an exemption should not be denied such by reason of

being a member of a partnership in those cases where licenses are required of the individual members of a partnership and not of the partnership as such.

This section applies to exemptions provided by the act from State, county, and, as specifically noted (Section 4), municipal licenses.

Therefore, you are advised that two veterans engaging in business together, each meeting the prescribed requirements for exemption, are entitled to exemption from municipal license to the extent of \$35.00 if the license is levied on the partnership, or \$35.00 each if the license is levied on them individually.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 7, 1947.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

Agriculture and Industries—Termite Control—Fire Insurance—Title 2, Section 675, Code of Alabama 1940, as amended—General Acts of 1943, page 468.

The Department of Agriculture and Industries may not legally accept a bond written by an insurance company not qualified to write fire insurance in the State of Alabama in lieu of the blanket fire insurance policy required by Title 2, Section 675, Code of Alabama 1940, as amended, which section requires that said policy must be carried in a fire insurance company qualified to do business in Alabama.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1947, is as follows:

"The Legislature of 1943 amended Sections 674, 675 and 676 of Title 2 of the Code of Alabama of 1940. The termite operators are required in Section 675 to secure and carry in a fire insurance company, qualified to do business in the State of Alabama, a blanket insurance policy in the sum of \$5,000 for the protection of the owner or owners of the building which they have treated.

"The C & L Exterminating Company of Gadsden has raised the question of a liability policy being satisfactory. I am enclosing a letter from this company, their liability policy, and a copy of a letter from the Bureau of Insurance. Please give us an opinion on whether we can accept the liability policy in lieu of a policy written by a fire insurance company."

Title 2, Section 675, Code of Alabama 1940, as amended by Act No. 499, General Acts of 1943, page 468, provides in part as follows:

"* * * and any person or operator so engaging in the treatment of any building or structure for subterranean termite eradication or subterranean termite control shall be required to secure and carry in a fire insurance company, qualified to do business in the State of Alabama, a blanket insurance policy in the sum of five thousand dollars for the protection and insurance of the owner or owners of any such building or structure so treated against any explosion or fire loss or explosion or fire damage proximately caused by such treatment of such building or in the act of so treating such building or structure for subterranean termite eradication or control. * * *"

The policy attached to your letter was written by the Massachusetts Bonding and Insurance Company of Boston, Massachusetts. This company is qualified in Alabama to do business as a casualty company, but is not qualified in Alabama to write fire insurance. The bond written by said company covers liability to persons and property arising from the operation of "exterminating vermin—excluding the use of gas of any kind, except calcium cyanide." However, in view of the express provisions of Section 675, as amended, it is my conclusion that the bond does not meet the requirements of said section which specifically provides for a blanket insurance policy in the amount of \$5,000.00 carried in a fire insurance company qualified to do business in Alabama.

It is, therefore, my opinion that you may not legally accept the bond written by the Massachusetts Bonding Insurance Company in lieu of a blanket fire insurance policy in the amount of \$5,000.00 written by a fire insurance company qualified to do business in Alabama.

I am returning herewith the bond and letter from the C & L Exterminating Company which were enclosed with your request.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 7, 1947.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

Agriculture and Industries—Rules and Regulations—Title 2,
Sections 4 and 59, Code of Alabama 1940.

The Commissioner of Agriculture is without authority to enact rules and regulations providing for the payment of the tax levied under the provisions of Title 2, Section 59, Code of 1940, upon persons manufacturing or selling commercial feeds, which rules and regulations are in conflict with the express provisions of said Section 59.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 13, 1947, is as follows:

"I am requesting an opinion on the following:

"Section 59, Title 2, Stamp tax on commercial feeds provides in substance that each manufacturer or seller of commercial feeds shall pay to the Commissioner a stamp tax fee of 20 cents per ton.

"The manufacturers and sellers have requested that they be permitted to pay this stamp tax fee quarterly.

"Can the Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture and Industries by regulation, provide that a manufacturer or seller may elect to pay the stamp tax fee in this manner or continue to use printed stamps to be provided by this office?

"The suggestion is that in lieu of using printed stamps that the analysis tag used by feed manufacturers or sellers could be surcharged (stamp tax paid Alabama Department of Agriculture and Industries). In the case of packaged feeds this surcharge could be on the analysis printed on said package."

Under the provisions of Title 2, Section 58, Code of Alabama 1940, every person manufacturing or selling commercial feeds as defined in Section 56 of said Title "shall pay to the commissioner a stamp tax fee of twenty cents per ton for each ton of commercial feeds sold in this state, and shall affix to or accompany each lot shipped in bulk, or each bag or parcel of such commercial feeds, a stamp to be furnished by the

commissioner, specifying that all charges specified in this section have been paid."

The requirements of Section 59, supra, contemplate and necessitate that the tax be paid in advance. The Legislature has declared by the statute in what manner the tax must be paid and collected and how the evidence of the payment of the tax must be shown.

The following statement in regard to the power of an administrative authority to enact rules and regulations is found in 42 Am., Jur., Public Administrative Law, Section 49:

"The Legislature, having declared its policy and purpose and provided standards for the exercise of the power, may confer upon administrative authorities the power to enact rules and regulations to promote the purpose and spirit of the legislation and carry it into effect, * * * The authority to make rules to carry out a policy declared by the lawmaker is administrative and not legislative, * * * Such power is not the power to make law, but the power to carry into effect the will of the lawmaker as expressed by the statutes * * * However, the delegation of power to make rules and regulations cannot extend to the making of rules which subvert the statute reposing such power, or which are contrary to existing laws, * * *."

While it is true that under the provisions of Title 2, Section 4, Code of Alabama 1940, the Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture and Industries, is authorized "to promulgate such rules and regulations as are reasonably and necessary to accomplish the evident purpose and intent of the law," such authority could not be construed to authorize the Commissioner to make rules and regulations providing the manner in which the tax under consideration may be collected and paid when the method of collection and payment is expressly provided for in the statute under which the tax is levied.

Such rules and regulations would be contrary to law, in that they prescribed a different manner of collection and payment of tax than is prescribed in the statute levying the tax. Furthermore, such rules and regulations are not necessary to accomplish the purpose and intent of the law that is being administered.

It is therefore my opinion that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 11, 1947.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Counties—Agriculture—

Title 12, Section 12, Sub-section 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

1. The court of county commissioners or other governing body of a county is not authorized to expend its money for the purpose of employing a person to assimilate and collect data concerning the county and furnish such data to a private individual who is writing a history of Alabama.

2. The court of county commissioners or other governing body of a county is authorized to purchase a power spraying machine to be used in spraying cattle and other livestock to destroy flies, lice, cattle grubs, etc.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 12, 1947, is as follows:

"Mrs. Marie Bankhead Owen, is writing a history of Alabama, and is calling upon the Counties of Alabama for collection and assembling data with regard to agriculture, timber, schools, roads, industries and other resources.

"Under Title 12, Section 12 and Subdivision 22 and page 349 of the 1940 Code of Alabama and Amendments thereto, is the Court of County Commissioners of Pickens County, authorized and empowered to employ at a reasonable expense some one to collect and prepare this data for said use?

"Is the Court of County Commissioners of Pickens County authorized or empowered, under the laws of Alabama, to purchase a power spraying machine to be used in spraying cattle and other livestock in the County, to destroy flies, lice, cattle grubs, etc., that infest livestock. This spraying machine is to be used under the direction of County organization on regular Schedules.

"Thanking you in advance for giving your opinion at the earliest possible date."

My answer to your first inquiry is in the negative.

Title 12, Section 12, Sub-section 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, authorizes county governing bodies to:

"22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision."

The purposes of the above quoted sub-section are plainly set out therein. One purpose is to authorize county governing bodies to set aside, appropriate and use county funds or revenues for developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of the several counties of the State. Its further purpose is to empower county governing bodies to set aside, appropriate and use county funds or revenues for locating and promoting agricultural, industrial and manufacturing plants, factories and other industries in the several counties in the State. The import of this Sub-section is and must be confined to the expenditure of monies for the express purposes set out therein, and its terms cannot be extended beyond the express power therein granted.

It appears from your request that an individual is writing a history of Alabama, and the space in said publication allotted to Pickens County must of necessity be only a small and minute part of this publication. It appears that this history is being written by a private individual for her own personal gain, and to preserve for posterity historical facts and data concerning the State of Alabama.

Were this a history of Pickens County written for the purpose of advertising or promoting those resources or industries set out in Sub-section 22, *supra*, then, of course, my answer to your question would be different. On the contrary, this is not a history of Pickens County but a history of the State of Alabama as a whole, and it would not tend to advertise or promote such resources or industries in Pickens County within the purview of said sub-section.

It is my opinion that it was never the Legislature's intention to authorize counties to expend their funds under the provisions of Sub-section 22, *supra*, to aid a private individual in the preparation of a work for his or her own personal gain and satisfaction.

My answer to your second inquiry is in the affirmative.

It is my judgment that the provisions of Sub-section 22, *supra*, relating to the development and promotion of the agricultural resources of the several counties are sufficiently broad to authorize a county governing

body to expend county funds for the purpose of purchasing a power spraying machine to be used in spraying cattle and other livestock in the county to destroy flies, lice, cattle grubs, etc. Certain it is that livestock infested with flies, lice, cattle grub, etc., are of an inferior grade; and the use of such a spraying machine to eliminate these parasites would improve the grade of livestock in the county. It necessarily follows that this would be developing and promoting the agricultural resources of the county.

Additional authority for the purchase of this particular spraying machine is found in Title 2, Section 365, Code of Alabama 1940. This section provides that the governing body of a county may appropriate county funds for aiding in the work of suppression or eradication of any infectious, contagious or communicable disease of livestock. This authority, however, is hypothecated on the fact that the state or federal authorities have taken up the work for suppressing such diseases. It is common knowledge that flies, lice, cattle grub, etc., are carriers of infectious, contagious or communicable diseases among livestock. If the livestock in your county are infected with any such disease, then I suggest that you communicate with the State Department of Agriculture and Industries and solicit aid in this regard. If such work is started in your county by the State authorities, then there can be no doubt as to the authority of the county to aid in this work in any way deemed advisable under authority of Title 2, Section 365, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
P. O. Box 91,
Mobile 1, Alabama.

Plumbers—Licenses—Title 51, Section 574, Code of Alabama 1940

Act No. 472, General Acts 1935, page 995.

1. A person engaged in the business of plumbing outside the city limits of Mobile, and not in another incorporated municipality of the county, does not have to qualify with the Board of Plumbers Examination and Registration of Alabama before engaging in said business.

2. License issued under Title 51, Section 574, Code of Alabama 1940, is a vocational tax on the privilege of doing business as a plumber and is not to be confused with permits issued by

the Board of Plumbers Examination and Registration of Alabama.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of February 11, 1947, is as follows:

"Please advise whether a person who is planning to engage in the business of plumbing outside of the City Limits of Mobile, has to qualify with the State Board of Examiners before starting the business.

"Also, please advise if a person who pays the maximum license under Section 574 (Plumbers, Steamfitter, Tin or Roofing Shop) may do business outside the City of Mobile without paying an additional license.

"We have had several inquiries relative to the business of Plumbers and any information in regard to the license and qualifications required of those entering into this profession will be appreciated."

The first question you raise brings into consideration Act No. 472, General Acts 1935, page 995, which Act created the Board of Plumbers Examination and Registration of Alabama referred to.

It is noted that the act relates to counties in the State having a population of eighty thousand or more, and, therefore, applicability would extend to Jefferson, Mobile and Montgomery Counties only.

Incorporated in the act are various provisions relating to the qualifications of an applicant which must be met before the Board will issue him a master or journeyman plumber's "license" or "permit." Other sections relate to violations and penalties under the provisions of the act. It is specifically noted that Section 12 of the act restricts the act in its applicability. This section is quoted as follows:

"It shall be unlawful for any person to do or perform, or to contract, direct or superintend any plumbing done within any incorporated town, village, city in any such county in the State of Alabama unless legally licensed so to do as provided by this act."

In an interpretation of the scope of the above section, this office has previously held that "any such county" refers to the counties of Jefferson, Mobile and Montgomery, and that "within any incorporated town, village, city" confines applicability of the act to the charter territorial limits and boundaries of the town, village or city. Thus the act does not apply to persons engaged in the plumbing business outside incorporated municipalities within the three counties named. This office, in the interpretation commented upon, even went further and also held that the

applicability of the act did not extend to the police jurisdiction of the incorporated municipalities. The reasoning in brief on this latter point was based on Webster's Unabridged Dictionary's definition of the word "within" as "lying inside certain walls and boundaries" and the import of the case of *White v. City of Decatur*, 225 Ala. 646, 144 So. 873. In this case, the Supreme Court held that under the police jurisdiction statutes of municipalities (Title 37, Section 9, Code of Alabama 1940), conferring police jurisdiction on territory outside the city limits but adjoining the same, the City of Decatur in *Morgan County* had the right to levy a license tax within the three mile limit of territory adjoining the city although that extended into *Limestone County*. The act under consideration here applies only to Jefferson, Mobile and Montgomery Counties, and cannot be extended to other counties. Therefore, the legislative intent appears clear that the charter territorial limits and not the police jurisdiction limits of incorporated municipalities were contemplated in the operation of the act. I concur with the conclusion reached in this opinion, a copy of which is enclosed for your benefit, said opinion covering fully the point herein considered. Quarterly Report of Attorney General, Vol. 24, page 7.

You are, therefore, advised that a person engaging in the business of plumbing outside of the city limits of Mobile, and not in another incorporated municipality of the county, does not have to qualify with the Board of Plumbers Examination and Registration of Alabama before engaging in said business.

In answer to your second question, your attention is further directed to the opinion noted, *supra*. Title 51, Section 574, Code of Alabama 1940, simply imposes a State vocational tax on the privilege of doing business as a plumber within the State in the manner and amount prescribed by this code section. Compliance with this section meets the requirements of the State in the matter of license fees. Remaining, therefore, are county and city license fees. You ask if a person pays the maximum license under Section 574, may he do "business outside the City of Mobile without paying an additional license?" From what has been said above, it is apparent that the requirements of county license fees must also be met. Your attention in this regard is directed to Act No. 546, General Acts 1943, page 535, which amended Title 5, Section 831, Code of Alabama 1940. Subsection (B) of Section 1 of this act reads as follows:

"There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of Article I of Chapter 20, for state purposes and which are payable to the Judge of Probate or Commissioner of Licenses, a sum equal to fifty per cent of the amount levied for state purposes, except as otherwise specifically provided."

Finally for determination is whether or not, and under what conditions, the City of Mobile may levy a license without its city limits. Your atten-

tion is directed to Act No. 502, General Acts 1943, page 477, which provides in pertinent part as follows:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this act, such licenses paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession. * * * *"

Therefore, it is seen that the municipal license fee of the City of Mobile may extend to the police jurisdiction thereof in the manner and under the conditions above noted.

In conclusion, I wish to stress the distinction made between the requirements set forth by the Board of Plumbers Examination and Registration of Alabama under Act No. 472, supra, and the imposition of vocational license taxes by the State, its counties and municipalities, in the vocational license tax field. This has evidently led to much confusion. In my opinion, it would appear that you, as Commissioner of Licenses of Mobile, are concerned only with the collection of the vocational license fees due the State and county and whether or not the requirements of the Board of Plumbers Examination and Registration of Alabama are being met would be a matter directing itself solely to said Board for investigation, determination and enforcement in accordance with the authority given the Board under those legislative enactments setting forth its operative scope.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. T. R. Ward,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Banks and Banking—Counties—Payment of claims—Title 12,
Section 110, Code of 1940.

1. A national bank that handles for deposit or otherwise a county warrant drawn upon a State bank which is not a mem-

ber of the Federal Reserve System may charge exchange on such warrant.

2. Where no specific statute authorizes the payment of a claim against a county for services performed in good faith, such claim may be paid under the provisions of Title 12, Section 110, Code of 1946.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 17, 1947, is as follows:

"In our County we have two Banks: The Headland National Bank located at Headland and The Bank of Abbeville, a State Bank located in Abbeville. Due to the location of these Banks and to be in harmony with all sections the Commissioners Court has deemed it wise for the sake of peace to use both banks as County Depositories. The County has operated harmoniously under this plan for a number of years. We have at present the General Fund and the Gasoline Tax Fund in The Bank of Abbeville and the other funds in The Headland National Bank.

"At various times it becomes necessary to transfer funds from one Bank to another. In the past this has been done without exchange charges either way. However, we have been advised by the Headland National Bank that according to a Federal ruling they will have to charge exchange on all Warrants drawn on funds on deposit with the Bank of Abbeville for deposit with the Headland National Bank. Further, such a charge has been made on transfers in this manner for the past few months. The reason given for this action is that the Federal ruling National Banks must charge this exchange on all non par checks. In the course of a year such charge will run into a great deal of money.

"Please advise me if such charge can legally be made on these transfers from one depository to another. If such a charge cannot legally be paid by the Court of Commissioners where will the liability rest."

Before proceeding to answer your specific questions, I deem it advisable to call your attention to a recent opinion of this office rendered to Hon. H. W. Clayton, Judge of Probate, Marshall County, under date of January 29, 1947, which opinion holds that the governing body of a county may not designate two banks to act as county depository. A copy of this opinion is herewith enclosed for your guidance.

Your first question is whether or not the charge referred to in your request can legally be made on transfers from funds on deposit in the

Bank of Abbeville, such transfers being made by warrant presented to the Headland National Bank for deposit.

My answer to this question is in the affirmative.

Upon investigation, I find that the Federal ruling to which you refer is to the effect that no national bank may handle for deposit or otherwise a warrant drawn on a State bank which is not a member of the Federal Reserve System without charging exchange thereon. The Federal authorities look upon such banks as non par banks and classify checks and warrants drawn upon such banks as non par checks, and such authorities have instructed all National Banks to charge exchange upon warrants or checks drawn upon such non par banks. This, of course, is a Federal rule and regulation over which the State of Alabama has no control. The obvious reason for this ruling is to protect the National Banks in handling warrants drawn on banks who do not belong to the Federal Reserve System.

You are, therefore, advised that, in my opinion, the Headland National Bank is within its right in complying with this Federal regulation and the exchange charge by it is legal.

Your second question is if such charge is legal may the Commissioners' Court pay for such charge. My answer to this question is in the affirmative.

While I find no specific statutory authority for paying claims such as the one here considered, it is my judgment that such claims may be paid under the authority of Title 12, Section 110, Code of 1940. This section is in pertinent part as follows:

"The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature, for tick eradication or for building public roads. * * * * *"

It is unquestionable that the Headland National Bank performed the service of handling these warrants in perfectly good faith and you are, therefore, advised that the county may appropriate a sum from the general funds or any special funds of the county for the payment of these exchange charges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. Ernest Shelton,
Clerk of the Circuit Court,
Lawrence County,
Moulton, Alabama.

Sheriffs — Intoxicating Liquors — Mileage — Title 11, Section 100, Code of Alabama 1940—Title 29, Sections 152-237, Code of Alabama 1940.

Mileage allowed sheriffs in prohibition cases not limited to those cases involving seizures of one gallon or more of whiskey.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, dated February 17, 1947, is as follows:

“Is the sheriff entitled to mileage when he seizes less than a gallon of whiskey?”

My answer is in the affirmative.

Title 11, Section 100, Code of Alabama 1940, provides in pertinent part as follows:

“* * * When a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages, either with or without warrant, there shall be taxed in his favor against the defendant on conviction, in addition to any other fees and charges now allowed by law, ten cents per mile each way from the courthouse to the place of arrest, and all expenses for the transportation of the contraband or prohibited liquors and beverages from the place of arrest to the courthouse.”

Title 29, Section 152, Code of Alabama 1940, provides that the officer making a seizure under a writ in an injunction case for the abatement of a liquor nuisance shall be allowed the sum of ten cents per mile for every mile travelled in making the seizure.

Title 29, Section 237, Code of Alabama 1940, provides that an officer making the seizure of contraband liquor under a search warrant shall be allowed the sum of ten cents per mile for each mile travelled in the execution of the writ.

It is noted that none of these statutes providing for mileage in prohibition cases conditions the right to receive such mileage allowance upon the amount of liquor involved in the particular case. It is, therefore, my

opinion that those instances in which the sheriff is entitled to mileage are not limited to cases of seizure of a gallon or more.

This office reached the same conclusion in an opinion to Honorable Grady Boyd, Clerk, Register, Cleburne County, Heflin, Alabama, under date of April 27, 1944, **Quarterly Report of the Attorney General**, Volume 35, page 30. That opinion expressly overruled a contrary holding in an opinion rendered to Honorable S. G. McVay, Sheriff, Clarke County, Grove Hill, Alabama, under date of September 15, 1927, **Biennial Reports of Attorney General**, 1926-28, page 282.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. T. R. Ward,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Counties—Title 12, Section 12, Subdivisions 17 and 22. Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

County governing bodies authorized to appropriate and expend funds in assisting the Production Marketing Association in the payment of office rent in the furtherance of and promotion of agriculture.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of February 17, 1947, is as follows:

"The Production Marketing Association (formerly AAA) in our County has requested the Commissioner's Court to assist them in their program by paying their office rent. The Board is fully in favor of doing this if we can legally do so.

"Will you please advise me if a payment of rent for the Production Marketing Association office is legal."

The applicable statutory law is found in Title 12, Section 12, Subdivisions 17 and 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560. These statutory provisions give the county governing bodies virtually unlimited authority in the appropriation of

funds to aid in the growth, promotion and expansion of agriculture in the several counties of this State.

This office has held that county governing bodies may appropriate and expend funds for the following matters and things in connection with the agricultural growth of the respective counties:

To install and maintain exhibit of agricultural resources—**Quarterly Report of the Attorney General**, Volume 9, page 80;

To pay the salary of an assistant for the Farm Security Administration program—**Quarterly Report of the Attorney General**, Volume 10, page 132;

To make an appropriation for the promotion of agriculture—**Biennial Report of the Attorney General**, 1932-34, page 430;

To appropriate money for soil erosion and promotion of agriculture—**Biennial Report of the Attorney General**, 1934-36, page 294;

To aid in payment of the administrative expenses of the officers of the Farm Security Administration—**Quarterly Report of the Attorney General**, Volume 17, page 399;

To furnish Farm Security Administration with telephone—**Quarterly Report of the Attorney General**, Volume 18, page 344;

To compensate an employee of the Triple A for additional and independent services performed for the county—**Quarterly Report of the Attorney General**, Volume 17, page 247;

To appropriate county funds for club house in promotion of agriculture—**Quarterly Report of the Attorney General**, Volume 20, page 51;

To purchase a motion picture machine for the sole use of County Extension Service Agents in projecting visual education on farm subjects—**Quarterly Report of the Attorney General**, Volume 39, page 52.

All of the above opinions were predicated upon the statutory law which now appears as Title 12, Section 12, Subdivisions 17 and 22, *supra*.

I am of the opinion that the county may appropriate and expend funds in assisting the Production Marketing Association in its program by paying its office rent.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Counties—Courts of County Commissioners—Gasoline Excise Tax—Title 51, Section 647, as amended; Title 51, Section 655; Title 51, Section 657, as amended; Code of Alabama 1940.—General Acts of 1943, p. 480.

The court of county commissioners is without authority to sell gasoline tax anticipating warrants solely for the purpose of temporarily investing the funds derived from the sale of such warrants in United States Government bonds, such bonds to be converted into cash as needed for the purposes for which such revenue may be expended.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 10, 1947, is as follows:

"It is the purpose of the Court of County Commissioners, of Dale County to offer an issue of gasoline tax warrants for sale in the near future, the proceeds to be used, of course, in road and bridge construction and maintenance.

"The reason for going ahead at this time is to avail ourselves of the low interest rate.

"It has been suggested that we can then invest the proceeds from the sale of such gasoline tax warrants in United States Bonds, taking these down for cash along as needed in our road work, in this way offsetting the interest charge against us on the gasoline tax warrants.

"We wish your opinion as to the legality of such a transaction.

"May we legally sell gasoline tax warrants, temporarily investing the proceeds in United States Bonds, converting these into cash as our road and bridge work progresses?"

Under the provisions of Act No. 505, General Acts of 1943, page 480, county governing bodies are authorized "to invest the remaining surplus in any fund, after the adoption of the budget or provision has been made for anticipated indebtedness, in interest bearing securities issued by the United States Government which are guaranteed as to principal and which are redeemable upon application."

The excise tax on gasoline is levied under the provisions of Title 51, Section 647, Code of Alabama 1940, as amended. This section, as amended, provides that, with the exception of revenue derived from the sale of gasoline "for aviation fuel," as defined in said section, the revenue derived from the sale of gasoline, after the payment of cost of collection "shall not be used for any purpose other than for the construction, improvement, maintenance and supervision of highways, bridges and streets, including the retirement of bonds for the payment of which such revenues have been or may hereafter be pledged. The payment of the per diem and mileage of members of county governing bodies when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets, shall be construed as used in supervision. However, the governing body of each county in Alabama is authorized to expend an amount not to exceed one-third of the total amount of such revenue that may be received by such county in the payment of any debt that may have been incurred by such county for the construction or maintenance of roads or bridges."

Under the provisions of Title 51, Section 655, Code of Alabama 1940, "One-third of the proceeds of the excise tax herein imposed, less cost of collection and administering this article, shall be paid into the treasury to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State, payment to be made by state warrant to be mailed to the treasurer of such counties or depositories of such counties, on or before the tenth day of each month following collection." This section also provides that the expenditure of such funds by the county governing body in any manner other than that provided by law shall be a misdemeanor, and prescribes the punishment for such violation.

Further distribution of gasoline excise tax to the several counties of the State is provided in Title 51, Section 657, Code of Alabama of 1940, as amended. This section contains a provision in regard to the expenditure of such revenue by the counties very similar to the provision in regard to such expenditures contained in Section 647, *supra*.

It will be seen from Sections 647 and 657, *supra*, that the county's pro rata share of the revenue derived from the excise tax on gasoline may be used only for the purposes designated in said sections.

In view of the above statutes, it is my conclusion that the county is without authority to sell gasoline tax anticipating warrants solely for the purpose of temporarily investing the funds derived from the sale of such warrants in United States Government bonds, such bonds to be converted into cash as needed for the purposes for which such revenue may be expended.

Furthermore, it is my conclusion that Act No. 505, *supra*, was not intended to cover the situation presented by your inquiry. This act authorizes county governing bodies to invest surplus funds. It could not be construed to authorize a county governing body to sell gasoline tax

anticipating warrants to create a surplus to invest in United States Government bonds under the authority of said Act No. 505.

It therefore follows that your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile 1, Alabama.

Licenses—Delinquency—Penalties—Title 51, Sections 450, 834, 835, Code of Alabama 1940.

A license must be procured before the business on which it is levied is begun, and if not procured before the business is begun it is delinquent, and the penalty provided by law for such delinquency must be collected.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, under date of February 24, 1947, is as follows:

"A place of business opened on Sunday, Feb. 23rd and the State and County Licenses had not been issued for this business, however the City of Mobile license department was open on Saturday, Feb. 22nd, therefore could issue a City License. Today, Feb. 24th, we issued the State and County Licenses for this same business.

"Should this office collect a penalty on these licenses, in view of the fact that this office was closed all day Saturday, it being a legal holiday in the State of Alabama?

"The person who applied for the licenses stated that he came to the Court House Saturday and found the office closed after he had bought the City Licenses.

"Your earliest possible attention will be appreciated."

In answer to your inquiry, your attention is called to the following statutes:

Title 51, Code of Alabama 1940:

"Sec. 450. Who must procure state and county licenses.—Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a state license, and a county license when so required, and shall pay for the same. * * * *"

(Emphasis supplied.)

"Sec. 834. Penalty for failure to take out license.—(a) It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided. * * * *"

(Emphasis supplied.)

"Sec. 835. * * * (c) * * Where any license issuable by the probate judge or commissioner of licenses shall be delinquent, the same shall be subject to a penalty of fifteen percent of the amount of the license, which penalty must be collected by the probate judge or commissioner of licenses when the license is taken out together with interest at six percent from the date of delinquency. * * * *"

It will be seen from Section 450, supra, that a license must be procured before the business is begun. Under the provisions of Section 834, supra, it is unlawful to engage in or carry on any business or do any act for which a license is required "without having first paid for and taken out a license therefor."

This office has held: "Where a person not in business prior to October 1, 1935, begins operation of a new business for which a license is required, license therefor must be procured before beginning such business." Quarterly Report of Attorney General, Volume 1, page 299.

In view of the express provision of Section 450, supra, that the license must be procured and paid for before the business is commenced, and the provision of Section 834, supra, making it unlawful to engage in business without having first taken out a license, it is my opinion that the license in the instant case was delinquent and the penalty should be collected as provided in Section 835 (c), supra.

The fact that the office of the Commissioner of Licenses was closed on Saturday, February 22, which was a holiday, does not altar this conclusion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 12, 1947.

Hon. B. C. Davis, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

ASSIGNMENTS

VENDOR TO ALCOHOLIC BEVERAGE CONTROL BOARD

1. The Alcoholic Beverage Control Board has authority to contract for the purchase of alcoholic beverages and the vendors under such contracts have a legal right to assign the same to third parties unless the contract forbids.

2. The Board has authority and it is its duty to pay the contract debt to the assignee.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion under date of February 19, 1947, is as follows:

"At various times, the Alabama ABC Board receives a request for the acceptance of an assignment from a merchandise vendor or to accept an assignment of a lease.

"We respectfully request your opinion as to whether or not the Alabama ABC Board has authority to accept an assignment.

"An opinion rendered to Hon. William O. Baldwin, Chairman, Alabama ABC Board, under date of June 15, 1937, held that the Alabama ABC Board was without authority to accept an assignment. This opinion was overruled by an opinion dated September 2, 1939, by Assistant Attorney General Garrett.

"Both of the above requests for an opinion referred to specific circumstances. We now desire to have a direct opinion from you as to whether or not the Alabama ABC Board has authority to accept an assignment of a merchandise invoice or lease agreement."

Your letter calls the attention of this office to two of its official opinions in express conflict on the question of assignments of contracts entered into between the vendors and the Board for the purchase of alcoholic beverages.

The opinion rendered June 15, 1937, is reported in Vol 7, Quarterly Reports of the Attorney General, page 234. It admits that the law permits such assignments after the approval thereof by the Board and cites **Bank of Luverne v. Alabama Bank and Trust Co.**, 217 Ala. 635. This was a suit in equity seeking to settle the priorities between several assignees. The

assignments were made by a road contractor under a contract with the State Highway Department. The power to assign the debt due under the contract was not presented to the court nor was it passed upon by it. The opinion of this office went off on the theory that the Alcoholic Beverage Control Board had no authority to bind the state to pay to the assignees the contract between their vendors and the Board. It gave as a reason that contracts of the state can be entered into only by the officers and in the manner provided by law and cites **County Board of Education v. Slaughter**, 230 Ala. 229. The question in this case was whether an officer or governmental agent had authority to accept a check when the officer was required under the law to accept only money. The court held he had no such authority.

Our statutes and the decisions of the courts recognize the right of a vendor to assign all his legal and equitable rights due him under a contract of purchase unless expressly prohibited by the contract or some statute. He has this right with or without permission or acceptance of his debtor. These legal principles are so securely imbedded in our jurisprudence that it is unnecessary to discuss the authorities. See 3rd Ala. Digest, Sections 1 et seq., 6 C. J. S. (assignments) Section 1 (a) and (d); 4 Am. Jur. (assignments) Section 26.

Title 29 of the Code gives express authority to the Alcoholic Beverage Control Board to buy alcoholic beverages. Section 3 of this title creates the Board, and Section 4 places the administration of the law under the control of the Board. Section 5 sets forth in detail the duties and powers of the Board. It authorizes the Board to buy alcoholic beverages. Additional powers are set forth in other sections not necessary here to note.

The powers granted to the Board brings its purchases and contracts within the principle of assignments under the general law of the state. The Board's vendors have a legal right to assign their sales contracts unless the Board forbids in the contract.

Under these principles, the opinion of this office dated June 15, 1937, *supra*, was due to be overruled as set forth in the second opinion of September 2, 1939, Volume 16, Quarterly Reports of the Attorney General, page 204.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 12, 1947.

Honorable M. W. Foreman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

COUNTIES
PUBLIC HIGHWAYS—DAMAGES.

1. A county has no authority to pay damages for an injury to property caused by the negligence of its officers, agents or employees while constructing or repairing public highways of the county, in the absence of a statute specifically granting such authority.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion under date of February 13, 1947, is as follows:

"One of our county trucks was in the fault in a wreck on the highway which caused damage to a passenger car by bending it up considerably. Will you please advise if the county can legally pay a claim for the repairs of this passenger car not owned by the county but by a firm or an individual.

"If the county can pay for the repairs, please advise what fund we can pay it out of—General Fund or the Gas Tax Fund, or either, as the truck which belonged to the county was a dump body truck used by the road crew."

In addition to your letter requesting an opinion, I have your communication of March 1, 1947, making further explanation of the character of the work in which the employee was engaged at the time of the injury. This letter discloses that on the day of the accident the road crew was not at work and the driver was using the truck for his own private business.

A county in one sense is a political sub-division of the state, created for the purpose of aiding the state in the administration of government of the state. It is, in this sense, an arm of the state. The courts denominate this as governmental capacity. *Mobile County vs. Williams*, 180 Ala. 639, 61 So. 963.

It is the settled law of this state that counties are not liable for damages for injuries to persons or property caused by the negligence of its officers, agents, or employees while acting in a governmental capacity, in the absence of a statute expressly declaring such liability. *Jones vs. Jefferson County*, 206 Ala. 13, 89 So. 174; *Moore vs. Walker County*, 236 Ala. 688, 185 So. 175.

In the early case of *Askew vs. Hale County*, 54 Ala. 639, it was held that a county, in the construction of public roads in the county, was acting in a governmental capacity and was not liable for the negligence of its officers, agents, or employees while engaged in such work. That is still the law of this state.

The legislature has authority to change this rule of law by the enactment of statutes expressly rendering the county liable, but it has enacted no such general statute. It has adopted several local statutes for counties authorizing them to pay for such injuries, but none of them is applicable to your county.

It is the law of this state that counties have only powers as are granted to them by the legislature. It follows that your county is without legal authority to appropriate county funds to pay damages for injuries to property or persons caused by the negligence of its officers, agents, or while constructing or repairing public highways of the county. Moreover, your letter indicates that the employee in this case was off duty and using the county truck for his own private purposes at the time of the accident which caused the injury to property here under consideration.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 12, 1947.

Honorable Lloyd G. Hart,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Officers—Jury Commissioners—School Teachers—Title 30,
Section 9, Code of Alabama 1940.

A school teacher employed by a County Board of Education
may not hold office as Jury Commissioner.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion under date of February 19, 1947,
is as follows:

"Please give me an official ruling on the following question.

"Title 30, Section 9 of the Code of Alabama 1940, Membership
etc. of Commissioners, states as follows: 'Members of the Commission
shall not, during the term of which they are appointed and during

the continuance in said office, hold any other office by appointment or election or perform any other duties under Federal, State, County or Municipal Government, which carries with it any compensation whatsoever.' Under the above Code Section, may a teacher employed by the Conecuh County Board of Education hold office as Jury Commissioner?"

I am of the opinion that your inquiry should be answered in the negative.

The disqualification set out in Title 30, Section 9, Code of Alabama 1940, quoted in your letter of inquiry, is broad and all inclusive. Although a school teacher employed by a County Board of Education may not be considered as holding an office under this section, yet he is performing a public duty under the state and county government, which carries with it compensation. He clearly comes within the inhibition of Section 9, *supra*.—Quarterly Reports of Attorney General, Volume 22, page 123; Biennial Report of Attorney General, 1934-1936, page 323; Biennial Report of Attorney General, 1930-1932, page 164.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 12, 1947.

Mr. Ward W. McFarland, Director,
State Highway Department,
Montgomery 4, Alabama.

Trailers—United States Government—U. S. Bureau of Mines—
Title 36, Section 80, Title 36, Section 90, Code of Alabama 1940—
Act No. 58, General Acts 1932, Extra Session, page 68.

1. The prohibition against operating four-wheel trailers in Title 36, Section 80, Code of Alabama 1940, does not apply to four-wheel trailers owned and operated by the U. S. Bureau of Mines, since the latter is an agency of the United States, and such vehicles of such agency are exempt from Title 36, Section 80, by reason of Title 36, Section 90, Code of Alabama 1940.

2. The U. S. Bureau of Mines (30 U.S. C.A., Section 1) is an agency of the United States Government within the meaning of Title 36, Section 90, Code of Alabama 1940, and the vehicles owned and operated by such agency are exempt from the provisions of Title 36, Section 80, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 11, 1947, is as follows:

"Under Title 36, Chapter 3, Article I, Section 80 of the Code of Alabama, the use of four-wheel trailers on the highways of this State is prohibited.

"Under the same title, Article 2, Section 90, vehicles owned by the United States Government are exempt from regulations as to size, weight, etc., as prescribed in Article 2, Section 90.

"The United States Bureau of Mines want to operate machinery mounted on a four-wheel trailer in this State in the handling of business in that Department.

"I will thank you for your opinion as to whether or not a full trailer, sometimes called four-wheel trailers, owned and operated by the United States Government are exempt from the law prohibiting the use of such trailers on the highways of this State?"

In my opinion a full trailer, sometimes called a four-wheel trailer, owned and operated by the United States Bureau of Mines, is exempt from the law of Alabama prohibiting the operation of trailers.

The provision of law governing this matter was originally enacted by the Legislature at its Extra Session in 1932, Act No. 58, General Acts 1932, Extra Session, page 68. A "trailer" is defined by that Act, in Section 2 thereof, as "any vehicle designated to be drawn by a motor-truck or truck-tractor, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise and with a load capacity of over 1,000 pounds." This same definition is now found in Title 36, Section 1, Subsection (h), Code of Alabama 1940. The 1932 Act, *supra*, in Section 3, provided that, "No person shall operate any trailer on any highway." This provision of the 1932 Act is now found in Title 36, Section 80, Code of Alabama 1940, which is as follows: "No person shall operate any trailer as defined in this title on any highway in this state and no trailer or semi-trailer of any kind shall be used for the hauling of passengers for hire, unless exempted under article 2 of this chapter."

Article 2 of the chapter, referred to in Title 36, Section 80, *supra*, provides for exemptions in Title 36, Section 90, Code of Alabama 1940, as follows: "There shall be exempt from the provisions of this article motor trucks, semi-trailer trucks or trailers, owned by the United States, or any agency thereof, . . ." The latter exemption appears in Section 10 of the 1932 Act.

Although Title 36, Section 90, *supra*, in exempting trailers owned by

the United States, refers to the provision of Article 2 (governing size, weight, width, etc.), it is my judgment that the exemption in favor of trailers owned by the United States or any agency thereof also applies to the prohibition upon the operation of trailers found in Title 36, Section 80, *supra*. The exemption, as worded in Section 10 of the 1932 Act, made the exemptions applicable to the entire Act. See Section 10 of Act No. 58, *supra*.

Since the operation of trailers is prohibited by Title 36, Section 80, and since trailers owned by the United States or any agent thereof are exempted by Title 36, Section 90, and both of said sections were part of the same original act, wherein the exemption was treated and was applicable to Title 36, Section 80, as it appeared in the 1932 Act, it is my judgment that the Legislature intended that the United States Government and its agencies should not be prohibited from operating a full trailer.

Section 80, therefore, is not applicable to trailers, four-wheel or otherwise, operated by an agency of the United States Government.

It is perhaps unnecessary to add that the United States Bureau of Mines is an agency of the United States Government within the meaning of Title 36, Section 90, Code of Alabama 1940. See Title 30, U. S. C. A., Section 1.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 12, 1947.

Hon. Lee McCorkle,
Sheriff, Colbert County,
Tuscumbia, Alabama.

Sheriffs—Costs and Fees—Guard Fees—Title 11, Section 100,
Code of Alabama 1940.

When prisoner is committed to jail by former sheriff and is released by newly elected sheriff, the guard fee should be paid to the former sheriff, for the reason that the former sheriff and not the newly elected sheriff commits him to jail, and guards him.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated February 8, 1947, is as follows:

“In jail cases where a prisoner is committed under the administration of one Sheriff and during the time the prisoner is confined

in jail the newly elected Sheriff takes office and the said prisoner is released under his administration should the Guard Fee be divided between the two Sheriffs or does the Sheriff under whose administration the prisoner was admitted get all the Guard Fee?"

In my judgment the former sheriff and not the newly elected sheriff is entitled to the guard fee.

Title 11, Section 100, Code of Alabama 1940, provides in part as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say:

* * * * *

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not..... 2.00.
 "In all arrests under indictment whether convicted or not.... 2.00.
 "In all other cases where convictions follow arrests..... 2.00."

In order to claim this fee the sheriff must lawfully commit the prisoner to jail. The fee or allowance is in truth and in fact a "turn key" allowance and before it accrues the officer must actually commit the prisoner to jail. *Quarterly Report of Attorney General*, Vol. 18, page 88. The facts stated in your inquiry show that this duty was performed by the former sheriff and could not have been performed by the newly elected sheriff since the prisoner was confined when he assumed office. Since the former sheriff lawfully committed the prisoner to jail and guarded him until he was relieved of his duties by the new sheriff, it is my judgment that he is entitled to the appropriate guard fee provided for in Title 11, Section 100, quoted above. The former sheriff, under the statement of facts in your inquiry, is the only officer who has performed all of the service for which a fee is payable, namely, (1) the lawful commitment to jail of a prisoner and (2) the guarding of that prisoner.

All of the few cases that have decided whether a former or newly elected sheriff is entitled to the fees when part of the service is performed by the one and completed by the other hold that the officer performing most of the service or the essential part thereof is entitled to the fee. See 57 C. J. 1109, Section 1146(e), citing *Woods v. Gibson*, 6 Johns. (N. Y.) 125; *Ring v. Vogel Paint Co.*, 46 Mo. A. 374; *O'Brien v. Obel*, 46 Misc. 449, 92 N. Y. S. 333. See also *Dolliver v. Collingwood*, 15 R. I. 510, 8 Atl. 711; *Century Digest*, Sheriffs, Section 50.

The duty of the newly elected sheriff to guard without compensation those prisoners confined in jail at the time that he enters his office is one of the burdens he assumes as an incident to holding public office.

Yours very truly,

A. A. CARMICHAEL,
 Attorney General.

March 13, 1947.

Miss Grace Ward,
Clerk of Circuit Court,
Bibb County,
Centerville, Alabama.

Jury Commission—Clerks of Circuit Courts—

Under the provisions of Title 30, Section 15, Code of Alabama 1940, in counties of seventy-five thousand or less, the employment of the clerk of the circuit court as clerk of the jury commission is authorized but not mandatory.

Opinion by Assistant Attorney General Screws.

Dear Miss Ward:

Your request for an official opinion bearing date of February 28, 1947, is as follows:

"Will you please give me your opinion regarding the Clerk of the Circuit Court serving as Clerk of the Jury Commission, Title 30, Section 15, Code of Alabama 1940. I would like to know under this section, where the population is 75,000 or less if it is mandatory for the Clerk of the Circuit Court to serve as Clerk of the Jury Commission or can the Jury Commission select anyone other than the Clerk of the Circuit Court to serve in this capacity.

"Will you please render your opinion as early as possible."

In answer to your inquiry, it is my opinion that it is not mandatory for the clerk of the circuit court to be employed as clerk of the jury commission; and that someone else may be so employed. Section 15 of Title 30, Code of 1940, provides in pertinent part as follows:

"Sec. 15. Clerk of commission; remuneration.—In counties having seventy-five thousand population or less by the last federal census preceding the employment, **the clerk of the circuit court may be employed as the clerk of the jury commission** and in such counties the clerk of the jury commission whether he be the clerk of the court or not, shall be paid for his services rendered under the direction of the jury commission the sum of five dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission. * * * * " (Emphasis supplied)

The above quoted provision is plain and unambiguous. As regards the employment, the term "may" is used. This is a permissive and not a mandatory term. Moreover, in providing for the compensation of the clerk of the jury commission, the statute uses the expression, "whether he be the clerk of the court or not." The jury commission in counties

of seventy-five thousand population or less may employ the clerk of the circuit court or some one else as clerk of said commission. This is a separate and independent employment, the offer of which the clerk of the circuit court may accept or refuse.—Opinion to Hon. Roy O. Hill, Clerk, Circuit Court, Houston County, under date of February 20, 1947.—Cf. Quarterly Report of Attorney General, Vol. 1, page 59. Quarterly Report of Attorney General, Vol. 8, page 280.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 13, 1947.

Miss Addie Wiggins,
City Clerk-Treas.,
The City of Florala,
Florala, Alabama.

Municipal Corporations—Airports—Title 4, Sections 22 and 25, Code of Alabama 1940.

The governing body of a municipal corporation is authorized under Title 4, Sections 22 and 25, Code of Alabama 1940, to use money of the corporation for the purpose of building an airport, either by itself or in connection with the Civil Aeronautics Authority Program.

Opinion by Assistant Attorney General McQueen.

Dear Miss Wiggins:

Your request for an official opinion, under date of February 25, 1947, is as follows:

“Our City is contemplating building an airport under the CAA program. Please advise whether the City Council has the right to take money from the general fund to participate in this project.”

My answer to your inquiry is in the affirmative.

In this regard, your attention is called to Title 4, Sections 22 and 25, Code of Alabama 1940, respectively:

“Sec. 22. Municipal airports; authority to establish.—Each municipality of this state is hereby authorized to acquire, establish, construct, expand, own, control, equip, improve, maintain, operate and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the geographical limits thereof.”

“Sec. 25. Municipal airports; methods of acquisition.—Whenever, in the judgment of the council, or other governing body, of any

municipality of this state, it shall appear necessary or expedient for such municipality to acquire privately owned lands for airport uses, either within or without the geographical limits thereof, such municipality shall have power to acquire the same in fee simple by exercise of the right of eminent domain, by purchase or by gift. Each such municipality shall also have power to acquire a term of years in lands for airport uses. Provided further, however, that such municipality upon the passage of proper and regular resolution or ordinance authorizing such action may provide all or part of the cost of land so acquired for airport or airpark uses by giving as security a regular mortgage on the lands so acquired."

Section 22 herein above quoted specifically grants to each municipality in the State the right to acquire, establish, construct, expand, own, control, equip, improve, maintain, operate and regulate airports or landing fields.

Section 25, supra, authorizes the city council, when in its judgment it is necessary or expedient so to do, to acquire privately owned lands for airport uses, and such acquisition may be by purchase or otherwise.

You are, therefore, advised that the above two code sections, when read together, are ample authority for a municipal corporation to expend money from its general fund for the purpose of building an airport, either by itself or in connection with the Civil Aeronautics Authority Program.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 14, 1947.

Hon. C. E. Rentz,
Clerk Circuit Court,
Marengo County,
Linden, Alabama.

Probation—Cost and Fees—Title 42, Section 25, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, page 666.

1. Sheriffs are entitled to arrest fees for arresting delinquent probationers, but not entitled to guard fees and fees for serving witness subpoenas in probation hearings.

2. Witnesses are not entitled to fees for testifying in probation hearings.

3. Court reporters are not entitled to fee for reporting probation hearings.

4. Clerks of Circuit Court are not entitled to fees for issuing subpoenas in probation hearings.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated February 12, 1947, is as follows:

"I request an opinion on the following facts:

"We have a case in which the defendant was sentenced to six months hard labor with sentence suspended and defendant placed on probation on payment of fine and costs and during good behavior.

"A. The Sheriff was ordered to arrest the defendant and defendant was arrested, placed in jail and called before Court within 2 or 3 days, and was released by order of the Circuit Judge.

"(1) Would the Sheriff be entitled to this arrest and guard fee?

"B. The Sheriff was ordered to arrest the defendant a second time which he did and placed the defendant in jail.

"(2) Would the Sheriff be entitled to this arrest and guard fee?"

"C. At the hearing of this case the probation was revoked and defendant remanded to the Sheriff's custody.

"(3) Would the Sheriff be entitled to this guard fee?"

"D. A witness was summoned to appear at the 2nd hearing and did appear.

"(4) Would the Sheriff be entitled to 50 cents for serving this subp. and would the witness be entitled to mileage and 75 cents per day for attendance?

"E. The Court Reporter took down the evidence at this 2nd. hearing.

"(5) Would the defendant be charged with the Court Reporter's fee of \$5.00?

"(6) What part of the fees liable to be charged to defendant in 1-2-3-4&5 would the State pay if defendant was sentenced for ____ days to pay the costs at 75 cents per day?

"(7) If under order of the Circuit Judge the Clerk issues subpoenas would the clerk be entitled to 25 cents each for issuing same?

"Your prompt attention will be very much appreciated."

I assume that all of your inquiries pertain to situations occurring subsequent to the original sentence of the defendant, which sentence was suspended and probation granted. Based on this assumption, I will answer your inquiries in the manner hereinafter set out.

The pertinent statutory law is found in Title 42, Section 25, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, page 666. In a recent opinion of this office construing this section, reported in Quarterly Report of Attorney General, Vol. 43, page 40, it was held:

(1) Clerk not authorized to summon witnesses on hearing for revocation of probation.

(2) Sheriff entitled to fee for arresting probation violator.

(3) Clerk not entitled to fee for issuing warrant of arrest for probation violator.

The last paragraph of said opinion reads as follows:

"It was formerly held by an opinion of this office, rendered November 5, 1940, that the sheriff was not (sic) entitled to a fee for executing a warrant of arrest for a delinquent probationer. 21 Quarterly Report of the Attorney General, page 140-44. In view of the fact, however, that the Act has been amended and now provides 'costs and fees of officers of courts * * * including arrest fees for delinquent probationers upon order of the court or probation officer, * * * shall be paid in the same manner and from the same funds as if no suspension of sentence had interfered,' it is my opinion that the fees of the sheriff for executing the warrant of arrest, if not imposed upon the probationer by the court, are payable from the funds of the Department of Corrections and Institutions. We suggest that this fee can be collected from the Department by presenting them with a supplemental cost bill. In short, it appears that as amended the Probation Act now allows the sheriff a fee for arresting a delinquent probationer. There are no other fees provided for in hearings in the type referred to in your inquiry." (Emphasis supplied.)

Particular attention is invited to the last sentence of the above quoted paragraph. Reference is made also to an opinion reported in Quarterly Report of Attorney General, Vol. 20, page 270, which holds that witnesses testifying on hearings to revoke probation are not entitled to mileage and per diem.

In view of the above, it is my opinion that your specific inquiries should be answered as follows:

Inquiries A(1) and B(2) should be answered in the affirmative as to the arrest fees, and in the negative as to the guard fees.

Inquiry C(3) should be answered in the negative.

Inquiry D(4) should be answered in the negative as to both parts.

Inquiries E(5) and E(7) should be answered in the negative.

Inquiry E(6) is heretofore answered above. The arrest fees under A(1) and B(2) are payable from the funds of the Department of Corrections and Institutions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 14, 1947.

Hon. B. C. Davis, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.
Alabama Liquor Stores—

Distribution of Profits—Dormant Municipal Corporations—

1. Municipal corporations incorporated subsequent to the last decennial Federal census are entitled to participate in the distribution of the profits derived from Alabama Liquor Stores.

2. Dormant or inactive municipal corporations are not entitled to participate in the profits derived from Alabama Liquor Stores; neither should their population be considered in arriving at other municipalities' distributive share.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of February 19, 1947, is as follows:

"Specific reference is made to Sections 10 and 11 of Chapter 1, Title 29, of the 1940 Code of Alabama, to Attorney General's opinion dated November 24, 1939, by Assistant Attorney General Garrett and addressed to Hon. I. C. Heck, Comptroller, and to Act No. 255 of the regular session 1943 of the Legislature of Alabama, approved June 24, 1943.

"We refer to these statutes in connection with the distribution and use of ABC Stores Profits with particular reference to distribution of Profits to incorporated municipalities. We respectfully request your opinion as to the following:

"1. Are municipalities which were incorporated subsequent to the last decennial Federal census entitled to participation in ABC Stores Profits.

"Act No. 255 of the 1943 Legislature provided for the distribution of certain of the proceeds of ABC Stores Profits to be apportioned to the several incorporated cities and towns in the State on the basis of the ratio of the population of each such city or town to the total population of all such cities and towns. It further provided that the population should be ascertained for the purposes of distribution under the Act according to the last decennial Federal census next preceding commencement of the calendar year for which distribution is to be made.

"The opinion by Assistant Attorney General Garrett, dated November 24, 1939, referred to above, held that municipalities incorporated after the 1930 Federal census but before the passage of the Beverage Control Act were entitled to participation based on enumeration of inhabitants at the time of incorporation in accordance with the provisions of Section 1747 of the 1923 Code of Alabama. This opinion apparently referred to those municipalities incorporated after the 1930 Federal census but before the passage of the Beverage Control Act. It does not specifically state that any distribution of ABC Stores Profits should be made to any municipalities incorporated subsequent to the last decennial Federal census.

"We desire that the question be clarified as to the distribution of ABC Stores Profits to incorporated municipalities.

"2. The above mentioned statutes do not refer to any incorporated municipalities shown on the Federal census but which have become dormant or inactive incorporated municipalities.

"Although these incorporated municipalities appear on the Federal census, there is no authorized official to whom payment may be made for distribution of ABC Stores Profits based on population.

"Please let us know what disposition should be made as to the distribution and determination of ABC Stores Profits on a population basis as effected by dormant incorporated municipalities."

This opinion is dealing with the distribution of a portion of Alabama Liquor Store profits to all active incorporated municipalities in the amounts and according to the formula set out in Act No. 255, General Acts 1943, page 226. The opinion is not dealing with the distribution of a portion of Alabama Liquor Store profits to those incorporated municipalities wherein such stores are located.

My answer to your first question is in the affirmative.

This office, in the opinion referred to in your letter of inquiry ap-

pearing in Quarterly Report of the Attorney General, Volume 17, page 314, held that all incorporated municipalities which were in being at the time of the adoption of Act No. 401, General Acts 1939, page 526, which provided for the distribution of a portion of the profits of the Alabama Liquor Stores to the several heretofore incorporated municipalities, were entitled to participate in the distribution of the profits of the Alabama Liquor Stores regardless of the fact that such municipalities came into being after the last decennial federal census.

This opinion was based on the opinion of the Court of Appeals in **State vs. H. G. Fain Service Station**, 23 Ala. App. 239, 124 So. 119, certiorari denied 220 Ala. 55, 124 So. 121; wherein the court held that for the purpose of arriving at the amount of a license tax based on the population of municipalities as shown by the last federal census, if no federal census was in existence for any given municipality, then the tax was to be determined by the actual population of the municipality. The court pointed out in that case that to allow those persons subject to the tax to avoid the payment thereof until the next decennial federal census was taken would be entirely unjust if not absurd.

The holding of the court in the Fain case is equally applicable to the question here considered.

You are therefore advised that the opinion of this office appearing in Volume 17, *supra*, is applicable to Act No. 255, *supra*. That is to say all active incorporated municipalities in existence as of now are entitled to participate in the distribution of the profits of Alabama Liquor Stores regardless of the fact that such municipalities were incorporated subsequent to the last decennial federal census. It is to be noted that the phrase "heretofore incorporated" as that phrase appeared in Act No. 401, *supra*, has been eliminated from Act No. 255, and such act is now applicable to all incorporated municipalities.

The basis of distribution to those incorporated municipalities which came into being after the last federal census should, therefore, be the actual population of such municipalities. The actual population of these municipalities may be determined by contacting the Judge of Probate of the county in which such municipalities are located.

In answer to your second question, you are advised that the population of dormant or inactive incorporated municipalities should be disregarded in determining the distribution of Alabama Liquor Store profits.

It is evident from Act No. 255, *supra*, wherein it is provided that two-thirds of the municipalities' proportionate share of the profits shall be used for general purposes and one-third thereof for general welfare purposes, that the legislative intent was that only active incorporated municipalities should share in the distribution of these profits.

You are therefore advised that dormant or inactive municipalities, even though the population of such municipalities is shown on the last

federal census, cannot share in the distribution of these profits, and the population of such municipalities should not be considered in arriving at the distributive share of the active incorporated municipalities in the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1947.

Hon. E. T. Millsap, Chairman,
The County Commission of Monroe County,
Monroeville, Alabama.

Counties—Act No. 350, General Acts 1945, page 565.

1. If county governing body complies with the provisions of Act No. 350, General Acts 1945, page 565, by the creation and selection of members of a county recreation board, it may then appropriate county funds for the construction of a swimming pool to be used by the inhabitants of both the county and municipality thereof.

2. Such appropriation may be made jointly with a municipality.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, under date of February 21, 1947, is as follows:

"Please give us your opinion as to whether Monroe County can lawfully cooperate with the town of Monroeville in financing the construction of a public swimming pool for use by the people of both the town and county?"

It is my opinion that the county governing body of Monroe County may lawfully cooperate with the town of Monroeville in financing the construction of a public swimming pool for use by the inhabitants of both the town and county and may lawfully make an appropriation from the general fund of the county for such purpose if it has complied with the provisions of Act No. 350, General Acts 1945, page 565, with reference to the establishment of a recreation board.

Such authority is found in the provisions of Act No. 350, *supra*. This act, applicable to all counties and those municipalities with a population of not more than 100,000, according to the most recent federal census, after making provision for the establishment of a recreation board and prescribing the powers and duties of such board, provides as follows:

"Section 5. The governing body of a county or municipality may make appropriations from county or municipal general funds to the recreation board for the support and maintenance of the board, a recreational program, and recreational lands, buildings, equipment, and facilities. The governing body may designate for use as parks, playgrounds, and recreation centers and facilities any lands or buildings owned by, leased by, or loaned to the county or municipality. The governing body may improve and equip or appropriate funds to the board for improving and equipping the lands and buildings for recreational purposes. The governing body may acquire lands, buildings, and facilities for recreational purposes by means of purchase, lease, loan, gift, or condemnation procedure and shall have power to accept financial and other aid and grants for recreation purposes from any public or private agency. Any county or municipality may join with one or more counties or municipalities in acquiring property for recreational purposes and, through the recreation board, join similarly in the operating and maintaining of playgrounds, parks, and recreation centers and facilities. Any county or municipality may cooperate with another county or municipality by establishment and maintenance of a joint recreation board."

It is also provided in such act that the provisions thereof are to be liberally construed. It is my opinion that the above quoted section of this act, even without liberal construction, contains ample authority to authorize a county governing body to appropriate county funds for the construction of a swimming pool as described in your letter, if it has complied with the provisions of the act with reference to the establishment and selection of members of a recreation board.

It is my further opinion that you may cooperate with the town of Monroeville in financing the construction of this swimming pool and that such appropriation may be made jointly with such municipality.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1947.

Hon. Ira Davis,
Sheriff, St. Clair County,
Ashville, Alabama.

Title 22, Section 26, Code of Alabama 1940, as amended by
Act No. 492, General Acts 1943, page 454.

1. Sheriff is not required to sign death certificate when deceased died of natural causes without medical attendance.

2. Sheriff is not required to sign death certificate in any case when given no notice of the death and no request is made,

nor opportunity afforded him, to investigate such death to determine the cause of same.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion under date of February 24, 1947, is as follows:

"Quite often when people die suddenly from heart trouble or some other natural cause, the relatives do not call a doctor, but call the undertaker. The undertaker will take the body and bury it, then some few days later will send a death certificate to me asking that I sign it. Often times I do not know the person is dead until I receive the death certificate.

"Please advise me if I am required, as sheriff, to sign death certificates under the above circumstances."

You are advised that there is no provision of law requiring you, as sheriff, to sign death certificates under the circumstances set out in the above letter.

As I understand your letter, you refer to deaths occurring from natural causes and without medical attendance. If such be the case, the provisions of Title 22, Section 26, Code of Alabama 1940, as amended by Act No. 492, General Acts 1943, page 454, are applicable and give answer to the question presented by your letter. The provisions of said statute are as follows:

"§ 26. Registration of deaths occurring without medical attendance.—In the case of any death occurring without medical attendance, it shall be the duty of the undertaker, or other person to whose knowledge the death may come, to notify the local registrar of such death, and when so notified the local registrar shall, prior to the issuance of a burial permit, inform the county health officer, who shall immediately investigate and certify as to the cause of death; provided, that if the health officer has reason to believe that the death may have been due to an unlawful act or neglect, he shall then refer the case to the coroner or other proper officer for his investigation and certification. The coroner, or other proper officer whose duty it is to hold an inquest on the body of the deceased person and to make the certificate of death required for a burial permit, shall state in his certification the name of the deceased person and shall prepare the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or if from external causes, the means of death; whether probably accidental, suicidal or homicidal; and shall in any case, furnish such information as may be required by the state registrar in order to properly classify the death. When there is no county health officer, and when there

is no reason to believe the death to be due to an unlawful act or neglect, in such cases only, the local registrar is authorized to complete the certificate from the statement of relatives or other persons having adequate knowledge of the facts; provided, that when there is reason to believe the death is due to an unlawful act or neglect and there is no county health officer, the local registrar shall notify the coroner or other proper officer for his investigation and certification."

An inspection of this statute shows that in the event of any death occurring under the circumstances described in your letter, it is the duty of the undertaker, or other person to whose knowledge the death may come, to notify the local registrar of such death. It then becomes the duty of the local registrar to inform the county health officer, whose duty it is to immediately investigate and certify as to the cause of such death. When there is no county health officer and there is no reason to believe the death to be due to an unlawful act or neglect, the local registrar is authorized to complete the certificate from the statement of relatives or other persons having adequate knowledge of the facts surrounding the death.

The other provisions of the above statute are not applicable to a situation such as that described in your letter. However, it might be pointed out that the only circumstances under which it is incumbent upon you to sign a death certificate is in the absence of the coroner and upon notice given you by the county health officer of a death that he has reason to believe may have been due to an unlawful act or neglect, with opportunity afforded you to investigate such death and hold an inquest thereon. In no event would you be required to sign a death certificate where you had no prior knowledge of the death, and were not afforded an opportunity to investigate such death.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 18, 1947.

Hon. Bradley G. Brown,
License Inspector,
Jefferson County,
418 Court House,
Birmingham 3, Alabama.

Licenses—Automobile Dealers—

Title 51, Section 462, Code of Alabama 1940, levying license on automobile dealers, is applicable to persons engaged in the business of dealing in, selling, or purchasing for resale automobiles, whether such persons maintain an established place of business or not.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated March 3, 1947, is as follows:

"We have, here in Jefferson County, two automobile auction sales, who have paid a license under Section 463-(b). On the days these sales are conducted, there are persons coming in here with automobiles from other states, offering automobiles for sale to licensed dealers and others, prior to the auction sale. When they are not successful in disposing of the automobiles by private sale, they then offer them for sale by auction; at which time the seller has the right to accept or reject the highest bid. It is my understanding (and as far as we can ascertain, it's true) that these sales are confined to dealers only; so it's to be presumed that the persons above referred to are out-of-state dealers, who come in here to sell, or purchase automobiles for resale.

"This office has taken the position that these persons are liable for a license under Section #462, Title 51 of the Code of 1940, although they have no established place of business in this State. As we are having many complaints from local licensed dealers regarding these persons not having a license, I will greatly appreciate your usual prompt attention in giving me an official opinion as to their liability."

It is my opinion that the persons operating in the manner set out in your inquiry are liable for the license imposed by Title 51, Section 462, Code of Alabama 1940. Said section provides as follows:

"§ 462. Automobile dealers.—Each person dealing in, selling, or purchasing for resale, automobiles, trucks, or other self-propelled vehicles, shall pay an annual state license as provided in this section, and shall pay a county license of one-half the amount of his state license for the use of the counties. The following licenses shall be paid by each dealer, each agent or other person, except agents of a dealer who have procured the licenses required in the following section: In cities and towns of fifty thousand or more inhabitants, one hundred and forty dollars; in cities and towns of over twenty-five thousand and not exceeding fifty thousand inhabitants, one hundred dollars; in cities and towns of over ten thousand, and not exceeding twenty-five thousand inhabitants, eighty dollars; in cities and towns of over five thousand and not exceeding ten thousand inhabitants, sixty-five dollars; in cities and towns of over two thousand five hundred, and not more than five thousand inhabitants, fifty dollars; in cities and towns of two thousand five hundred and less inhabitants, thirty dollars. In all other places, whether incorporated or not, thirty dollars; provided, a person maintaining more than one place of business in the same city or town for the sale of automobiles, trucks, or other self-propelled vehicles, shall pay an additional license of one-half of the license levied on his principal place of business for each additional place of business; provided, the licensed dealer may maintain

a used car lot for the sale or use of second hand cars without the payment of an additional license. Upon the payment of the license prescribed in this section such dealer shall not be required to pay the license as provided in sections 465-467, 472, 474, 605 of this title."

The above license, in my opinion, is levied for the privilege of engaging in the business of **dealing in, selling or purchasing for resale** automobiles, trucks or other self-propelled vehicles, without regard to maintenance of an established place of business or the manner in which the business is conducted. The proviso in the next to the last sentence of the section, relative to a person maintaining more than one place of business, is applicable only to such a person and has no bearing on the above conclusion.

The parties, functioning in the manner set out in your inquiry, are dealing in, selling, and purchasing for resale automobiles as a regular business and not as an isolated or occasional transaction. They are, in my judgment, liable for the license in question regardless of whether or not they maintain an established place of business.—Cf. **Quarterly Report of Attorney General**, Vol. 23, page 30.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 18, 1947.

Hon. C. B. Harvey,
Chairman, Subcommittee of the
Interim Committee on Highways,
Capitol.

Statutes—Taxation—Exemptions—Act No. 367, General Acts
1945, p. 590.

A statute exempting gasoline sold to farmers for use in tractors used exclusively in farm operation from the excise tax levied on gasoline under the provisions of Act No. 367, General Acts 1945, p. 590, would not be violative of any provision of the Constitution of Alabama.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 18, 1947, is as follows:

"In the capacity of Chairman of a sub-committee of the Interim Committee on Highways, I desire your official opinion on the following subject:

"Under the laws of Alabama certain taxes are levied on gasoline. Would any provision of the Constitution be violated by the enactment of a statute which would exempt gasoline sold to farmers for use in tractors on farms? In other words, the Committee desires to know whether the legislature, within the Constitution, may enact a law which would exempt from taxation in whole or in part, the sale of gasoline to farmers for use in tractors used exclusively in farming operations."

The excise tax on gasoline is levied under the provisions of Act No. 367, General Acts 1945, page 590, which Act provides in part as follows:

"(a) Every distributor, refiner, retailer dealer, or storer of gasoline shall pay to the State Department of Revenue an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawal from storage in this State for any use, gasoline, as defined by Article 5, Title 51, Code of Alabama, 1940; provided, however, that where the excise tax of six cents per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by any retail dealer, or storer, such payments shall be sufficient, the intention being that the tax shall be paid but once."

It is my conclusion that a statute exempting gasoline sold to farmers for use in tractors used exclusively in farming operations from the excise tax levied by Act No. 367, *supra*, would not be violative of any provision of the Constitution of Alabama.

The following statement is found in 51 Am. Jur., Taxation, Section 501:

"§ 501. Legislative Power.—It is a fundamental rule of American jurisprudence that the power to prescribe what property shall be taxed implies the power to prescribe what property shall be exempt. It is inherent in the exercise of the power to tax that the sovereign state be free to select the subjects of taxation and to grant exemptions therefrom, and unless restrained by some particular provision of the state constitution the legislature has full power to exempt any person or corporation or class of property from taxation, according to its views of public policy and expediency. * * * * * (Citing *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868, 109 A. L. R. 1327.)

In the *Carmichael* case, *supra*, the court said:

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. * * * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * * * *

The opinion in the case of **Pullman Car and Manufacturing Corp v. Hamilton**, 229 Ala. 184, 155 So. 616, contains the following quotation from the case of **State v. Birmingham So. R. Company**, 182 Ala. 475, 62 So. 77:

“(1) The power of taxation is an incident of sovereignty and is possessed by the government without being expressly conferred by the people.’ See **Dobbins v. Commissioners of Erie County**, 16 Pet. (14 U. S.) 435, 10 L. Ed. 1022; **Ohio Oil Co. v. E. A. Conway**, 281 U. S. 146, 50 S. Ct. 310, 74 L. Ed. 775; **Phelps v. Union Bank & Trust Co.** 225 Ala. 238, 142 So. 552; **Phoenix Carpet Co. v. State**, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143.

“(2) The power is purely legislative.’ (Emphasis supplied.)

“(3) So long as no constitutional limitations are exceeded, the Legislature is of supreme authority, and the courts, as well as all others, must obey.”

In the **Pullman case**, *supra*, the court said:

“It follows that, the extent of the exercise of the power of taxation within constitutional limits being purely legislative, the power to exempt any class of property from taxation—an exemption not forbidden by the Constitution as being purely arbitrary, capricious and without semblance of reason—is likewise a matter for the exercise of legislative policy and judgment, with which the courts are not concerned. Such is the effect of our decisions. * * * ” (Citing numerous Alabama cases.)

It is within the power of the Legislature to select the subjects of taxation and to grant exemptions to particular classes of persons or property from the taxes levied. The granting of an exemption is subject to the following restrictions: (1) There must be a reasonable basis for the exemption. (2) The exemption must apply in a uniform manner to all members of the class exempted.

In exercising the power of declaring what class of persons or property shall be exempt from a tax, the Legislature must, of necessity, be left a liberal scope for the free exercise of this presumably wise discretion. **State v. Alabama Fuel and Iron Company**, 188 Ala. 487, 66 So. 169.

In the **Carmichael case**, *supra*, the court said:

“A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.”

See also **State ex rel. Smith Attorney General v. Elmer Bank & Trust Company**, 18 Ala. App. 253, 91 So. 917; **Lee v. State Tax Commission**, 219 Ala. 513, 123 So. 6; **Crow v. General Cable Corp.**, 223 Ala. 611, 137 So. 657.

In view of the above authorities, it is my opinion that a statute exempting gasoline sold to farmers for use in tractors used exclusively in farm operations from the excise tax levied on gasoline by Act No. 367, supra, would not be violative of any provision of the Constitution of Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 20, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile, Alabama.

License Inspectors—Citation fees—Penalties—Title 51, Section

835, Subsections (c) and (g), Code of Alabama 1940—

1. The citation fee to which a license inspector is entitled accrues to such license inspector for personal service rendered by him and should be paid to the inspector rendering the service.

2. Penalties collected from delinquent licensees should be paid to the license inspector in office at the time of collection, as such penalties accrue as a matter of law and do not grow out of any personal service rendered by the license inspector.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of February 3, 1947, is as follows:

"I shall appreciate your official opinion on the following questions:

"Since the former License Inspector, J. R. Ennis' term expired midnight January 31, 1947 and his successor's term commenced February 3rd, 1947, to whom should this office pay the penalties that were charged and collected on February 1st, 1947?

"To whom should this office pay the citation fees that were collected on February 1st, 1947? These citations were served prior to February 1st, 1947 by the former License Inspector, J. R. Ennis.

"On February 3rd, 1947 and thereafter, if a person buys a License, and this person was cited by J. R. Ennis, License Inspector, should this office pay J. R. Ennis the citation fee collected by this office?

"I have read your opinion directed to Hon. Norvelle R. Leigh, Jr., Judge of Probate, Mobile County in the Quarterly Report of The Attorney General, Vol. XXX, page 41, but it is not clear to me as to whom this office should pay the citation fees collected after the License Inspector's term has expired, and the former License Inspector served the citations."

Your supplemental letter of March 5, to which is attached copy of letter dated February 4, 1947, from Mr. J. A. Stephens, Assistant Commissioner of Revenue, extending Mr. Ennis' term of office until Saturday, midnight, February 1, 1947, removes the question as to whom the citation fees and penalties collected on delinquent licenses on February 1 should be paid. Mr. Ennis was in office through and including this day and all citation fees and penalties collected on delinquent licenses should be paid to him.

The citation fee allowed the license inspector by Title 51, Section 835, Subsection (g), Code of Alabama 1940, is for a personal service rendered by such inspector, and the fee should be paid to him upon collection thereof.

You are, therefore, advised that the citation fees collected from delinquent licensees, when citations were served by Mr. Ennis, should be paid to him.

We find an entirely different situation in regard to penalties collected from delinquent licensees.

The penalty for delinquency provided by Title 51, Section 835, Subsection (c), Code of Alabama 1940, attaches to the issuance of a delinquent license automatically, and the same is payable to the license inspector, even though he issues no citation to the delinquent licensee.

Since it appears from your supplemental letter that Mr. Ennis went out of office midnight, February 1, 1947, any penalties collected from delinquent licensees after that date, should properly be paid to Mr. Ennis' successor. This is true even though Mr. Ennis served the citations on these delinquent licensees.

The above conclusions are in accord with the holdings of the Supreme Court in the case of *Henry v. Drennen Motor Car Co.*, 235 Ala. 559, 180 So. 563, and opinions of this office appearing in Quarterly Report of Attorney General, Vol. 6, page 108; Quarterly Report of Attorney General, Vol. 20, page 7; and Quarterly Report of Attorney General, Vol. 30, page 41.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 20, 1947.

Hon. J. O. English,
Judge of Probate,
Coffee County,
Enterprise, Alabama.

Licenses—Exemptions—Title 51, Section 541, Code of Alabama 1940—

Certain exemptions from State and county license because of physical disability do not extend to such license for operation of a junk yard, (Title 51, Section 541, Code of Alabama 1940), and a person operating a junk yard is not exempt from State and county license levied thereon because of physical inability to perform manual labor.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, dated February 21, 1947, is as follows:

"We have an applicant who wishes to obtain license to operate a 'Junk Yard' in the City of Enterprise, Alabama.

"This applicant states that he is disabled to do manual labor, but his physical condition will allow him to operate a 'Junk Yard.' He understands from the physician who examined him that he would be entitled to his license free of charge for both State and county.

"This applicant is not a war veteran and neither is he blind, therefore we are unable to find in the Code where he is entitled to free license."

A close perusal of the statutory law of this State does not reveal any exemptions from State and county license payment to any person because of physical disability except in those cases of blind persons (Title 51, Section 832, Code of Alabama 1940), and war veterans (Title 51, Section 852, Code of Alabama 1940, as amended), and persons physically disabled to the extent of thirty percent from transient vendors and peddlers license (Title 51, Section 611, Code of Alabama 1940).

You are, therefore, advised that no exemption from State and county license for the operation of a junk yard (Title 51, Section 541, Code of Alabama 1940) is afforded any person because of physical inability to perform manual labor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 25, 1947.

Hon. Ed Tietgen, Mayor,
Town of Summerdale,
Baldwin County,
Summerdale, Alabama.

Municipalities—Elections—Act No. 465, General Acts 1945,
page 699.

Under Act No. 465, General Acts 1945, page 699, regular municipal elections should be held on the third Monday in September, 1948, and quadrennially thereafter in cities and towns not having a commission form of government.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 28, 1947, is as follows:

“A question as to election of officials in municipal elections—Is election to be held when county elections are held or is it legal to have election on date September 15, which has heretofore been date for Council elections?”

“If the date we have been using is wrong will you please indicate date on which election should be held.”

You are advised that the time for holding regular municipal elections in cities and towns that do not have a commission form of government is the third Monday in September, 1948, and quadrennially thereafter. Section 2, Act No. 465, General Acts 1945, p. 669, approved July 6, 1945. The third Monday in September 1948 falls on September 20 and not on September 15.

If the municipal election should not take place on the regular date, the council is required to fix some day, as early as convenient, on which day said election shall be held. Section 18, Act No. 465, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 25, 1947.

Honorable Frank A. Reagan,
Judge of Probate, Etowah County,
Gadsden, Alabama.

Agriculture and Industries—Licenses—Act No. 303, General Acts 1945, p. 498.

A person operating a cafe and only selling fresh salt water fish as part of the menu is not liable for the license tax levied under the provisions of Act No. 303, General Acts 1945, page 498, on "any person handling fresh salt water fish strictly at retail to the consumer."

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1947, is as follows:

"I have been requested to write you for an opinion as to whether under Section 171 (5), Title 8, 1945 Supplement to the 1940 Code of Alabama a person operating a Cafe and paying all other Licenses prescribed by the Code would have to buy a Retail Fish License. The only way they sell fish is as part of their menu.

"I will greatly appreciate an early reply."

The statute referred to in your request is Act No. 303, General Acts 1945, page 498 (Title 8, Section 171 (5) 1945 Cumulative Pocket Part, Code of Alabama 1940), which provides in part as follows:

"That each person, firm, or corporation engaged in buying or handling fresh salt water fish secured from commercial fishermen, or from other wholesale dealers, for the purpose of resale, whether handled on a commission basis or otherwise, and every person, firm, or corporation shipping fresh salt water fish out of the State of Alabama on consignment or order, shall be considered a wholesale dealer, and if such person, firm or corporation is a resident of the State of Alabama he or it shall be required to pay a license in the sum of twenty-five dollars per annum, said license to be issued by the director of conservation or his authorized agent. Any person handling fresh salt water fish strictly at retail to the consumer shall be considered a retailer and must purchase a license and pay the sum of five dollars per annum for same. * * *

In answer to your inquiry, it is my opinion that a person operating a cafe and only selling fresh salt water fish as part of the menu is not liable for the license levied under the provisions of Act No. 303, supra,

against "any person handling fresh salt water fish strictly at retail to the consumer * * *."

It will be seen from Act No. 303, *supra*, that the words "handling fresh salt water fish" are used not only in that part of the act levying a license on a retailer, but also in that part of the act levying a license on a "wholesale dealer."

The words "handling fresh salt water fish" are applicable to a person who is selling (handling) such fish in the regular course of trade, either as a wholesaler or a retailer, and not to a person operating a cafe and selling the same as part of the menu. The word "selling" might well have been used in the statute rather than the word "handling." Certainly, a person operating a cafe and selling such fish as part of the menu could not be said to be selling the same at retail to the consumer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 25, 1947.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Vending Machines—Licenses—Veterans' Exemptions—

Title 51, Section 613, Code of Alabama 1940, Act No. 353, General Acts 1945, page 570.

1. Veterans properly qualified under the provisions of Act No. 353, General Acts 1945, page 570, may claim the exemptions granted thereby in payment of the license taxes levied upon vending machines by Title 51, Section 613, Code of Alabama 1940.

2. Opinion of the Attorney General, Quarterly Report, Vol. 41, page 43, over-ruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

On November 27, 1945, you requested an official opinion of this office as follows:

"Please advise me, if under Veterans Act passed at regular Session, H. 352, approved July 6th, 1945, a veteran would be entitled to exemption for operating a vending machine, as provided under Schedule 613, Title 51, 1940 Code of Alabama.

"Under a ruling made to E. W. Long, Judge of Probate, Walker County, Alabama on November 21, 1931 it was held that the exemption allowed to Veterans did not apply to Pool Tables, as the license is on tables and not person. If this ruling still holds it seems to me it would also apply to Vending Machines.

"Please advise on this question at your earliest convenience."

An official opinion in answer thereto was rendered on December 4, 1945, Quarterly Report of Attorney General, Vol. 41, page 43, to the effect that the provisions of Act 353, General Acts 1945, page 570, granting exemptions to certain veterans from the payment of license taxes were not applicable to those license taxes levied upon vending machines by the provisions of Title 51, Schedule 613, Code of Alabama 1940. Such opinion was based upon the premise that, inasmuch as the license tax in question here was levied upon the machine itself and not upon the business of selling a product dispensed by the machine, no exemption could be claimed under the provisions of the above mentioned act.

Upon further consideration, and in the light of a subsequent opinion of this office, I am persuaded that this former opinion rendered you was in error and that properly qualified veterans are entitled to the exemptions ganted by Act 353, supra, in payment of license taxes levied upon vending machines by Title 51, Section 613, above cited.

In arriving at this conclusion, careful consideration has been given to the provisions of the above mentioned Act No. 353. Section 1 thereof prescribes the prerequisite qualifications required of those persons seeking to claim such exemptions and specifically excepts from such exemptions only those license taxes levied upon rolling stores and upon the registration or operation of motor vehicles.

Section 2 thereof provides as follows:

"Such veterans who shall engage in or carry on any businesses or occupations for which license taxes are prescribed by the State of Alabama shall be entitled to licenses from the State to engage in or carry on those businesses or occupations upon the payment of the license taxes prescribed, less, as regards each veteran, such portion of the license taxes as shall not exceed \$35.00."

Sections 3 and 4 contain the same provisions and prescribe the same exemptions with reference to county and municipal licenses.

Next considered are the provisions of Title 51, Section 450, Code of Alabama 1940, which statute provides as follows:

"Sec. 450. Who must procure state and county licenses—Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall

exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a state license, and a county license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this title."

In this same Title 51 a license tax is levied upon vending machines under the provisions of Section 613 thereof, which provides in part as follows:

"For each machine for vending gum, candy, cigarettes, milk, soft drinks, or other articles, or on which a person is weighed, or on which music is played: Where a machine is operated by pennies, one dollar; where a machine is operated by nickels or coins of larger denomination, eight dollars. * * *"

The above section was amended by Act 88, General Acts 1943, page 185. However, the amendatory act was held to be unconstitutional by an opinion of this office rendered to you on August 24, 1943. (Quarterly Report of Attorney General, Vol 32, page 100). Hence, the above quoted excerpt is from the act as it existed prior to amendment.

The operation of vending machines of the kind described in Title 51, Section 613, Code of Alabama 1940, requires the personal attention of one or more persons, depending upon the number of machines operated. The operation of such machines entails the servicing thereof; the constant filling and re-filling of such machines with the product, or products, dispensed thereby; the repair of such machines; the maintenance of an adequate supply of the product dispensed by the machines; and the removal of the coins therefrom. Such operation is a business or occupation within the purview of Title 51, Section 450, *supra*, and persons engaging therein are required by said section to pay a license tax measured by the number and kind of machines operated as provided in Section 613, *supra*.

That the operation of such machines is a business or occupation is definitely stated by the Court of Appeals in the decision rendered in the case of *Dunlap v. State*, 16 Ala. App. 440, 78 So. 638, a portion of said opinion being as follows:

"Paraphrasing what was said in *Quartelbaum v. State*, 79 Ala. 2, with regard to sewing machines:

"We may be pardoned for saying that where persons use a penny-in-the-slot machine for the purpose of selling chewing gum, they do it as a **business**. This is common knowledge, of which we cannot be supposed to be ignorant."

"The license is charged for the use of the machine as a **business**, and therefore the fact that an ad valorem tax is paid on the value of the machine itself would not make the license double taxation. 13 R. C. L. 486. Not being prohibited by the constitution, the power

to tax occupations, trades, businesses, etc., resides in the legislature. (Citations.) The power to tax includes the power to license, and to compel the payment of the tax as a condition precedent to engaging in the business. (Citations)." (Emphasis supplied)

I do not consider the constitutionality or reasonableness of the levy to be here in issue, although the levy was held to be both constitutional and reasonable by the above cited case of *Dunlap v. State*. The sole question regards the right of properly qualified veterans to claim the exemptions granted by Act 353, supra, in payment of license taxes levied upon vending machines.

Inasmuch as the operation of such machines is a business or occupation, both in the light of our taxing statutes and the decisions of our courts, I do not feel that properly qualified veterans should be denied the exemptions granted merely because the license tax on the business is imposed in the form of a levy upon the machines themselves. The method or manner of levying a tax is within the discretion of the legislature and such question is not material to the subject here considered.

It is, therefore, my opinion that properly qualified veterans may claim the exemptions granted by Act 353, General Acts 1945, page 570, in payment of the license taxes levied upon vending machines under the provisions of Title 51, Schedule 613, Code of Alabama 1940.

The above holding is in accord with the holding of an opinion of this office appearing in Quarterly Report of Attorney General, Vol. 43, page 57, to the effect that veterans entitled to exemptions under Act No. 366, General Acts 1945, page 589, are entitled to such exemptions as against the license tax imposed by Title 51, Sections 450 and 575, Code of Alabama 1940, for the operation of pool tables.

Accordingly, the opinion of this office rendered to you on December 4, 1945 (Quarterly Report of the Attorney General, Vol. 41, page 43) is hereby over-ruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1947.

Honorable R. F. Lyon,
Treasurer, Shelby County,
Columbiana, Alabama.

OFFICERS AND OFFICES—

Clerk of Jury Commission—Clerk of Board of Revenue—Clerk of the Circuit Court—County Treasurer. Constitution of Alabama 1901, Section 280—Title 41, Section 5, Subsection 7, Code of Alabama 1940.

1. The clerk of the Jury Commission is not an officer, nor

the position which he holds an office of profit within the meaning of Constitution of Alabama 1901, Section 280, or Title 41, Section 5, Subsection 7, Code of Alabama 1940.

2. The clerk of the board of revenue, the clerk of the circuit court, or the Treasurer of Shelby County may also serve as clerk of the jury commission.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of March 5, 1947, is as follows:

"Will you please advise me officially, whether any one or all of the following county employees may serve, for pay, as clerk of the Shelby County Jury Commission?

"1. Clerk of the Board of Revenue, who is paid salary and is appointed by the Board of Revenue.

"2. The Clerk of the Circuit Court, who is on the Fee System entirely. The office is elective.

"3. The County Treasurer who is paid a salary. The office is elective and operates under a Local Act."

I have examined the local acts of Shelby County and their amendments creating the board of revenue and the county treasurer (Act No. 134, Local Acts 1911, pages 154-157; Act No. 326, Local Acts 1915, pages 199-200; Act No. 298, Local Acts 1919, pages 115-116 (all applicable to the board of revenue), and Act No. 608, Local Acts 1919, pages 231-233, and Act No. 270, Local Acts 1931, pages 129-130 (applicable only to the county treasurer)) and find nothing therein prohibiting either the clerk of the board of revenue or the county treasurer from acting as clerk of the jury commission of that county while holding his respective office or position. I have also examined the general law as to their duties and authorities and find nothing prohibiting them from also acting as clerk of the jury commission.

Title 30, Section 15, Code of Alabama 1940, specifically provides that the clerk of the circuit court may be employed by the jury commission to act as clerk of the commission in counties having a population of 75,000 or less according to the last Federal census. (Shelby County is such a county.)

All your questions harken back to the Constitution of Alabama 1901, Section 280, which so far as here applicable, provides that no person shall "hold two offices of profit at one and the same time" except certain officers therein named. To like effect is Title 41, Section 5, Subsection 7, Code of Alabama 1940.

The question presented may be concretely stated. Is the clerk of the jury commission an officer, or the position which he holds an office, within the meaning of the constitutional or statutory provisions above mentioned?

Title 30, Section 19, Code of Alabama 1940, expressly provides: "The jury commission may at any time discharge any clerk employed by it and employ another." In the language of the jury commission law cited above, the clerk of the commission is the mere agent or employee of the commission and is subject to its directions and to removal at its will.

Obviously, the clerk of the jury commission is not an officer, nor is his position an office within the meaning of Section 280, *supra*, or Title 41, Section 5, Subsection 7, *supra*. *Ward et al. vs. State ex rel. Goldsmith* 203 Ala. 306, 82 So. 662.

From the following, it is manifest that the clerk of the board of revenue, the clerk of the circuit court, or the county treasurer of Shelby County may hold his respective office or position, and, at the same time, act as clerk of the jury commission of that county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1947.

Hon. John C. Sandlin, Sheriff,
Limestone County,
Athens, Alabama.

**INTOXICATING LIQUORS—
SEARCH AND SEIZURE—MOTOR VEHICLES**

1. A sheriff or any other law enforcement officer authorized to make searches and seizures may search motor vehicles for prohibited liquors or beverages, at any time of the day or night, provided he has probable cause to believe that such motor vehicles are illegally transporting prohibited liquors or beverages.

2. In such a case, a search warrant is not required.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of February 7, 1947, is as follows:

"As sheriff of Limestone County, Alabama, I would like for you to render me your official opinion as to whether or not I am permitted to search taxi cabs and other automobiles at night time with

a search warrant in cases where I have probably cause to believe such vehicles are illegally transporting whiskey or other alcoholic beverages.”

In my opinion, a sheriff or any other law enforcement officer authorized to make searches and seizures may search motor vehicles for prohibited liquors or beverages, at any time of the day or night, provided he has probable cause to believe that such motor vehicles are illegally transporting prohibited liquors or beverages. In such a case, a search warrant is not required.

That this is the law of this State appears abundantly clear from the case of *Tranum v. Stringer*, 216 Ala. 522, 113 So. 541. I can do no better than quote at length from the opinion of the court in that case which opinion, in turn, quotes at length from an earlier opinion of the Supreme Court of the United States:

“Counsel for appellant, in brief, say:

“The agreed question of law as stated in the agreement signed by counsel and on file in this case is whether a sheriff or other arresting officer or any other person acting under authority of law in the enforcement of the prohibition laws of the state may, without search warrant, lawfully stop and search in a reasonable manner an automobile which he has reasonable and probable cause to believe and does believe is then and there transporting intoxicating liquors, and which automobile was then and there transporting intoxicating liquors.”

“The first and major inquiry is whether such search is in violation of section 5 of the Bill of Rights incorporated in the Constitution of Alabama, which declares:

“That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.”

“The Fourth Amendment to the federal Constitution reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

“Clearly enough these provisions of the federal and state Constitutions are in substance the same, and have a common purpose. The federal amendment may be regarded historically as the parent of the like provision of the state Constitution.

"In *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790, the Supreme Court of the United States in an illuminating opinion by Chief Justice Taft has fully considered the question of search and seizure without warrant under the National Prohibition Act (U. S. Comp. St. Sec. 10138¼ et seq.) as affected by the Fourth Amendment.

"We think it fitting to let that court speak for itself. After reviewing numerous statutes and decisions, the opinion proceeds:

" 'We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' * * *

" 'On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. * * *

" 'Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. * * * But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. * * *

" 'It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. *Stacey v. Emery*, 97 U. S. 642 (24 L. Ed. 1035). The measure of legality of such a seizure is, therefore, and the seizing officer shall have reasonable

or probable cause for believing that the automobile which he stops and seizes had contraband liquor therein which is being illegally transported.'

"We consider the principles announced in the Carroll Case entirely sound, and well supported by authorities therein reviewed. There is an obvious distinction between the reasonableness of a search of a dwelling or other stationary building without warrant and the search of an automobile, the most convenient agency of the rum-runner and the getaway criminal in general. In the one case there is no occasion to act without a search warrant; in the other a failure to so act means in many cases the utter impotency of law enforcement.

"We find nothing in the public policy expressed in our state Constitution and laws which calls for a construction of section 5 of the Bill of Rights at variance with that given the federal Constitution upon the question in hand.

* * *

"* * * the power and duty of seizure is not limited to cases where the officer finds the liquor being transported with the aid of the five senses, but where he 'becomes cognizant of the facts'; acquires knowledge from any source which measures up to the requirements of probable cause; such information as leads a careful, prudent man, regardless of the rights of the citizen, to a reasonable belief.

"Mere belief, however honest, is not enough. The rash and unduly suspicious cannot justify upon belief which may to him seem sufficient. There must come to him facts from sources which a prudent man deems reliable, and of sufficient probative force to lead such man to a reasonable belief; there must be probable cause to believe.

"In dealing with the individual case the fact that the automobile upon search is found to be transporting contraband liquors is of decided weight in passing upon the reasonableness of the search without warrant. That the car is in fact contraband tends to verify the information on which the search was made. The officer who acts upon information which proves unreliable, resulting in the stoppage and search of the car of an innocent citizen, carries the full burden of showing probable cause.

"It seems clear enough that section 4778 of the Code contemplates the seizure of contraband vehicles as well as contraband liquors without a writ of seizure or search warrant. The constitutionality of our statute in this regard has already been declared. *Maples v. State*, 203 Ala. 153, 82 So. 183; *Allred v. State*, 205 Ala. 193, 87 So. 842.

"The provisions of Code, Sec. 4748 et seq., dealing with search warrants in connection with our prohibition laws, clearly show they are directed to places where liquors are manufactured, sold, kept for sale or storage contrary to law, etc. They do not deal with the matter of searching and seizing automobiles and liquors transported therein."

Though this decision was handed down by our Supreme Court prior to enactment of the Alabama Beverage Control Act in 1937, which act is codified as Tit. 29, Chap. 1, Secs. 1-78, Code of Alabama 1940 (certain sections of which have been amended in respects not here material), it is equally applicable today as to the search and seizure of motor vehicles illegally transporting prohibited liquors or beverages.

It is to be noted that the Supreme Court, in the opinion above quoted from, states that Sec. 4748 et seq. of the Code of Alabama 1923, "do not deal with the matter of searching and seizing automobiles and liquors transported therein." These statutory provisions appear today as Tit. 29, Chap. 3, Art. 10, Secs. 209-256, Code of Alabama 1940. In view of this holding of the Supreme Court, it is my opinion that the procedure therein outlined is not applicable to searches and seizures of motor vehicles illegally transporting prohibited liquors or beverages.

As heretofore pointed out, it is not necessary for a sheriff or any other law enforcement officer authorized to make searches and seizures to have a search warrant in order to search motor vehicles, at any time of the day or night, if he has probable cause to believe that such motor vehicles are illegally transporting prohibited liquors or beverages. Indeed, a search warrant in such a case would be of no efficacy and would afford the sheriff no protection whatsoever, because the warrant could only issue on "probable cause," which is the only condition precedent to an officer's right to make a search of a motor vehicle for prohibited liquors or beverages without a search warrant.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 28, 1947.

Hon. Woodrow Hinds, Mayor,
Town of Arab,
Marshall County,
Arab, Alabama.

Schools—Municipalities—Taxation

Under a city ordinance levying a tax on tickets purchased for admission to motion picture theatres and other places of amusement requiring the tax to be paid by the purchaser of the ticket, and remitted by the seller of the ticket to the Town Council, "schools having various activities, such as plays, ball games, etc.," may be compelled by the city to collect the tax on tickets sold to such activities and remit the same to the city.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, dated February 20, 1947, is as follows:

"The Town Council of the Town of Arab, Alabama sometime ago passed an Ordinance levying a tax of one cent per ticket on all tickets of admission sold to any place of amusement within the corporate limits of the Town of Arab and one half cent on all tickets sold to places of amusement within the police jurisdiction. Under definitions in the Ordinance the word person is stated to mean: a natural person, firm, corporation, club, school, association, joint stock company, receiver, estate, trustee or any other person acting in a fiduciary capacity, owning or operating a motion picture theatre or other amusement place. The Ordinance makes it mandatory for the person buying the ticket for admission to an amusement place responsible for paying the tax. I would like to have your legal opinion as to whether the Town Council has authority to force schools having various activities, such as plays, ball games, etc., and selling tickets collect the tax stated and pay same into the Town Treasury."

Under the provisions of the ordinance levying the tax under consideration, the tax is levied on all tickets purchased for admission to places of amusement within the corporate limits of the town and the police jurisdiction thereof, the tax outside of the corporate limits of the town being one-half of that levied within the corporate limits. The ordinance makes it mandatory that a person buying a ticket to a place of amusement pay the amount of the tax levied under the ordinance.

The ordinance imposes a duty on the person receiving payment of the tax to make a return and pay the tax shown to be due thereby to the Town Council of Arab by the tenth day of the succeeding month in which the tax was collected.

There can be no question of an exemption of schools from the payment of the tax for the reason that the tax is not levied on the person selling the ticket, but is levied on the ticket, and paid by the purchaser thereof.

Answering your inquiry, it is my opinion that the City of Arab has authority under the ordinance to compel "schools having various activities such as plays, ball games, etc.," to collect the tax imposed by the ordinance, file a return with the City of Arab as required by Section 6 of the ordinance, and remit the tax shown to be due by the return to the Town Clerk.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 28, 1947.

Hon. W. B. Evans,
Member Jury Commission,
Clay County,

Cragford, Alabama.

Jury Commissioner—Notary Public—Member of County Democratic Executive Committee—Title 30, Section 9, Code of Alabama 1940—Title 17, Section 342, Code of Alabama 1940—Constitution of Alabama 1901, Section 168.

1. Under Title 30, Section 9, Code of Alabama 1940, members of jury commissions are not allowed, during the term for which appointed, to hold any other appointive or elective office.

2. The office of notary public is an appointive office and a jury commissioner cannot hold office of notary public at the time he is holding the office of jury commissioner.

3. Position of member of county democratic executive committee is not a public "office" within meaning of Title 30, Section 9, supra, but is a "party office" which jury commissioner may hold.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1947, is as follows:

"I was appointed recently to the Jury Commission of Clay County and received commission as member, Jury Commission of Clay County, dated February 12, 1947. I was also elected as member of the Democratic Executive Committee from Beat No. 11, Clay County and am now serving as such. I am also a Notary Public in and for the County of Clay, State of Alabama, which commission is dated December 30, 1946.

"Are either, or both, of these said last named offices such as to prevent my acting as a member of the Jury Commission of Clay County, under the provisions of the Code of Alabama, of 1940, Title 30, Section 9? If either, or both, of these offices are such as to bar me from acting as said Jury Commissioner, may I resign from whichever one or ones that I prefer, and serve in the position which I choose?"

You are advised that a member of the jury commission may not hold the office of notary public, but he may hold office as a member of the county democratic executive committee during his term as jury commissioner.

Title 30, Section 9, Code of Alabama 1940, provides as follows:

"Sec. 9. Membership, etc. of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever."

The above quoted statute is extremely broad in that it prohibits jury commissioners, during their tenure, from holding any other office by appointment or election.

The broad language of this statute disqualifying jury commissioners from holding any other elective or appointive office was probably enacted by the Legislature in order to remove members of the jury commission as far as possible from any outside influence.

It has been held that a jury commissioner may not perform the duties of a county draft board clerk, member of a county commission, national guard officer, mail carrier, United States employee, or town marshal. Quarterly Report of Attorney General, Vol. 22, p. 123; Biennial Report of Attorney General, 1936-38, p. 137; Biennial Report of Attorney General, 1934-36, p. 323; Biennial Report of Attorney General, 1930-32, p. 164; Biennial Report of Attorney General, 1926-28, p. 98. These opinions are based on the fact that these positions require the performance of public duties for which compensation is allowed.

A notary public is a public officer of the county. *Governor v. Gordon*, 15 Ala. 72; *Goree v. Wadsworth*, 91 Ala. 416, 8 So. 712. And he is appointed to an office by the Governor. Constitution of Alabama 1901, Section 168; *Carey v. State*, 76 Ala. 78.

In my judgment, therefore, a notary public holds an "office by appointment" within the meaning of Title 30, Section 9, Code of Alabama 1940.

It is further my opinion that your position as a member of the county democratic executive committee is not "any other office by appointment or election" within the meaning of Title 30, Section 9, Code of Alabama 1940. In considering a statute prohibiting county commissioners from holding "any other office" this office held that a member of the county democratic executive committee is not a "public officer" within the purview of that statute. Title 12, Section 7, Code of Alabama 1940; Quarterly Report of Attorney General, Vol. 26, p. 97. The reasoning in that opinion is applicable to the term "any other office" as used in Title 30, Section 9, Code of Alabama 1940, since the two statutes are similar in nature and terms. A jury commissioner may therefore hold

the "party office" of a member of the county democratic executive committee without violating Title 30, Section 9, Code of Alabama 1940.

It appears from your inquiry that you were a notary public prior to the time that you were appointed as a member of the jury commission. Since a person cannot at the same time hold the office of jury commissioner and notary public, it is my judgment that when you enter upon the duties of the office of jury commissioner you will vacate the office of notary public. See Biennial Report of Attorney General, 1936-38, p. 137.

I suggest, therefore, that if you desire to remain jury commissioner (and also member of the county democratic executive committee) you may do so by entering upon the duties of the office of jury commissioner, in which event your office of notary public will be automatically vacated. On the other hand, if you desire to remain a notary public (and a member of the county democratic executive committee) you should resign as jury commissioner. If you choose the latter course, I suggest that you should be reappointed a notary public if you have performed any duties as jury commissioner, because the performance of such duties would cause your prior office as notary public to be vacated.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 28, 1947.

Hon. G. H. Howard,
Probate Judge,
Elmore County,
Wetumpka, Alabama.

Licenses—State—County—Exhibitions—Title 51, Sections 601, 830, and 831, Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, p. 355.

1. A person exhibiting a "freak calf" and charging admission is liable for the license levied under the provisions of Title 51, Section 601, Code of Alabama 1940.

2. Where a person has secured a license to carry on a business in the largest city in the county, the business may be carried on in any municipality in the county, if the license is "altered" by the probate judge as provided in Title 51, Section 830, Code of Alabama 1940.

3. There is no provision of law authorizing the transfer of the license levied under the provisions of Section 601, *supra*, from one county to another county in the State. Therefore, it is

necessary to purchase a state and county license in each county where the business is conducted.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 3, 1947, is as follows:

"Where a freak calf is placed on exhibition and admission charged is the license governed by Sec. 601 of Title 51. If so, would it be necessary to purchase a license for each place the calf is exhibited or would one license for the largest town in the county be sufficient. Also would it be necessary to purchase state and county license in each county where exhibitions are held."

Title 51, Section 601, Code of Alabama 1940, is as follows:

"Sec. 601. Theatres, vaudeville and variety shows.—Each person engaged in conducting a theatre, vaudeville or variety show, and each person conducting any other exhibition, show, entertainment, or performance to which an admission is charged and not in this chapter otherwise licensed, shall pay an annual license for each place of business as follows: In towns and cities of three thousand inhabitants or less, and in unincorporated places, five dollars; in cities of more than three thousand and less than seven thousand inhabitants, ten dollars; in cities of seven thousand and less than twenty thousand inhabitants, twenty dollars; in cities of twenty thousand and less than thirty thousand inhabitants, twenty-five dollars; in cities of thirty thousand inhabitants or more, thirty-five dollars."

In answer to your first inquiry, it is my opinion that a person exhibiting a "freak calf" and charging admission is liable for the license levied under Section 601, *supra*.

The license is levied on any person conducting an exhibition to which an admission is charged and not otherwise licensed under the provisions of Title 51, Chapter 20, Code of Alabama 1940. The words "conducting any other exhibition" used in Section 601, *supra*, are sufficiently broad to include the exhibition of a "freak calf."

In answer to your second inquiry, your attention is called to Title 51, Section 830, Code of Alabama 1940, which is as follows:

"Sec. 830. Change of place of business; alteration of license.—When a person has obtained a license to engage in or carry on any business, employment or profession at any definite place in the county or city in Alabama, and desires to remove to any other place within same county or city where license was granted and wishes his license altered accordingly, the probate judge who originally issued

such license shall make such alteration, which alteration shall be shown on the license records of the probate judge's office. Provided, that no license shall be altered to change a place of business to a location requiring a higher license than originally paid."

In view of the above section, if a person has secured a license to carry on a business in the largest city in the county, the business may be carried on in any municipality in the county if the license is "altered" by the probate judge as provided in Section 830, supra. Cf. Quarterly Report of Attorney General, Vol 15, p. 83. It, therefore, follows that if a license is purchased to carry on the business in the largest city in the county, it is not necessary to obtain a license for each city in the county in which the business is conducted; provided, of course, that the license is "altered" as provided in Section 830, supra.

It is my opinion that your third inquiry should be answered in the affirmative.

While there are provisions for the transfer of a license from one location in the county to another location in the county (Title 51, Section 830, Code of Alabama 1940; Title 51, Section 831, Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, page 355), there is no provision of law for the transfer of the license under consideration from one county to another. Cf. Quarterly Report of Attorney General, Vol. 14, p. 85.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 28, 1947.

Hon. G. A. Mosely,
Sheriff, Montgomery County,
Montgomery, Alabama.

MONTGOMERY COUNTY—

Sheriffs—Deputies—Counties—Courts of County Commissioners—Act No. 177, Local Acts 1943, page 95.

Under Section 6 of Act No. 177, Local Acts 1943, page 95, the sheriff and Board of Revenue of Montgomery County are authorized to determine existence of emergency necessitating the employment of an additional deputy or deputies, and when the existence of such an emergency is determined, the employment of an additional deputy or deputies, is authorized.

Opinion by the Attorney General.

Dear Sir:

I have your letter of recent date in which you request an opinion

on the following question: Does the illness of a member or members of your force of deputies constitute such an emergency as to authorize the employment of an additional deputy or deputies?

In my opinion, this is a question for determination by the Board of Revenue of Montgomery County, in response to a written request from you.

The statute applicable to this situation is Section 6 of Act No. 177, Local Acts 1943, page 95, which section is as follows:

"Section Six: That when in the opinion of the Board of Revenue of Montgomery County, Alabama, and the Sheriff, there exists an emergency necessitating additional Deputies for the period of the emergency that the Sheriff shall file with said Board of Revenue a request for the number of additional Deputies that may be necessary, and the Board of Revenue may authorize such additional Deputies as in its discretion may be necessary and said Board of Revenue may fix the compensation of such Deputies, shall require that they be bonded and the compensation as fixed by the Board of Revenue together with their bond and premiums shall be paid out of the general funds of the County, except that in cases where said Deputies are requested by individuals or corporations for the protection of such individual or corporate property, said Board of Revenue may require such individual or corporation to pay the bond premium and compensation of such Deputy. The selections and appointments of such additional Deputies shall be made by the Sheriff of Montgomery County, Alabama."

The Legislature by this statute has vested in the Sheriff and the Board of Revenue of Montgomery County authority to determine the existence of an emergency necessitating the employment of an additional deputy or deputies. In the event the Board of Revenue of Montgomery County and the Sheriff, acting pursuant to said statute, determine that such an emergency does exist, the employment of an additional deputy or deputies, as the case may be, is authorized.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

March 28, 1947.

Hon. Sibyl Pool,
Secretary of State,
Capitol.

Legislature—Secretary of State—Printing of Acts—Title 55,
Sections 126, 127, Code of Alabama 1940.

The joint resolutions passed at the organizational session of the Legislature held in January, 1947, and the joint resolutions passed at the special session of the Legislature held in March, 1947, may be held and bound in the same volume with the acts and joint resolutions of the regular session of the Legislature which will convene in May, 1947.

Opinions by Assistant Attorney General Arbuthnot.

Dear Miss Pool:

Your request for an official opinion bearing date of March 11, 1947, is as follows:

"During the Organization session of the Legislature held the week beginning January 13th, there were four (4) joint resolutions passed and approved by the Governor.

"During the Special Session which convened March 3rd and adjourned March 4th, there were two (2) joint resolutions passed and approved by the Governor.

"Is there any reason why these joint resolutions of the organizational and special sessions should not be held until after the regular May session and be bound together with the acts and resolutions of the regular session.

"I am enclosing herewith copy of letter received from the printer who has raised this question."

Title 55, Section 126, Code of Alabama 1940, provides as follows:

"Sec. 126. Acts and joint resolutions in two volumes; contents of.—The acts and joint resolutions of the legislature shall be printed and bound in one volume, unless they require more than twelve hundred pages on which to print them and the message of the governor, tables of interest of the several states, the names and post office address of the heads of all the departments, commissions and boards of the state government and of the officers and members of the legislature, and when the matter enumerated will take more than twelve hundred pages, they shall be printed and bound in two volumes of the same size, and the maximum price per page for printing shall not exceed three dollars."

There is nothing in the above section that would prevent the holding of the joint resolutions passed at the organizational session of the Legislature held in January, 1947, and the joint resolutions passed at the special session of the Legislature held in March, 1947, and binding of such resolutions in the same volume with the acts and joint resolutions of the regular session of the Legislature which will convene in May, 1947.

As a matter of practice for many years, acts and joint resolutions of the Legislature passed at a special session at which the number of acts and joint resolutions was small have been bound in the same volume with the acts and joint resolutions passed at the regular session held nearest thereto. See General Acts Alabama Regular Session 1943 and Special Session 1942; General Acts Alabama Regular Session and Special Session 1939; General Acts Alabama Regular Session 1927—Special Session 1926-1927. Such a practice is at times the most practical and economical method of handling this matter. Cf. Biennial Report of Attorney General, 1932-34, p. 263, in which it was held that the general acts and local acts passed at a session of the Legislature could be bound in the same volume.

Where a volume contains the acts and joint resolutions passed at a regular session and the acts and joint resolutions passed at a special session, the certificate of the Secretary of State required by Title 55, Section 127, Code of Alabama 1940, should precede each "set" of laws and each should be separately indexed. See General Acts Alabama Regular Session, 1943, and Special Session, 1942.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

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